Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MARK MORTENSON,

Petitioner

v.

ROCK SPRINGS VISTA DEVELOPMENT CORP., INC., A NEVADA CORPORATION; J.A. BLACK CONSTRUCTION, INC., A NEVADA CORPORATION; AND JAMES A. BLACK

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTIONS PRESENTED

During a search for a home (and in coordination with a disabled rights group's fair housing enforcement efforts) a disabled person (a wheelchair user) investigated the physical conditions of accessibility of a multi-family residence which was constructed for first occupancy after March 13, 1991. As result of the investigation, the disabled person encountered discriminatory structural conditions and thereby sustained intangible injuries for which the disabled person sought injunctive relief and money damages.

(1) May an injury related to discriminatory *structural* conditions (as described in subparagraph 804(f)(3)(C) of the Fair Housing Act (codified at 42 U.S.C. § 3604(f)(3)(C))) constitute an "injury in fact" (with regard to the requisite invasion of a legally protected interest) for the purpose of establishing standing under paragraph 804(f)(2) of the Fair Housing Act (codified at 42 U.S.C. § 3604(f)(2)), which prohibits discrimination against "any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling," on the basis of that person's disability?

(2) Do *intangible* injuries (even intangible injuries of a small, or "nominal" amount) to a plaintiff who seeks monetary relief for discrimination in violation of paragraph 804(f)(2) of the Fair Housing Act (codified at 42 U.S.C. § 3604(f)(2)), constitute "distinct and palpable" injuries for the purposes of establishing standing under Article III of the U.S. Constitution?

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PETITION FOR A WRIT OF CERTIORARI

Mark Mortenson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*, 1a-4a) is an unreported opinion. The opinion of the district court (Appendix B, *infra*, 5a-13a) is also an unreported opinion.

JURISDICTION

The court of appeals entered its judgment on May 8, 2001. Mr. Mortenson's petition for rehearing was denied on July 5, 2001 (Appendix C, *infra*, 14a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are Article III of the United States Constitution, and the Fair Housing Act (codified at 42 U.S.C. § 3601, *et seq.*), the relevant portions of which are set out verbatim at Appendix D, *infra*, 15a-20a.

STATEMENT OF THE CASE

On December 15, 1997, this case was originally brought by the United States under 42 U.S.C. § 3614. The case had been referred to the United States Department of Justice by the U.S. Department of Housing and Urban Development (HUD). Mortenson was one of several wheelchair users who

had brought the discrimination at Rock Springs Vista[1] to the attention of HUD through his filing a housing discrimination complaint on October 3, 1995.

Mortenson intervened in the case on June 1, 1998. He filed his First Amended Complaint in Intervention on March 2, 1999,[2] wherein he asserted: (1) that he had visited Rock Springs Vista (Appendix E, *infra,* 24a); and (2) that at the time of his visit to Rock Springs Vista, Mortenson observed various inaccessible structural conditions at Rock Springs Vista and sustained certain intangible injuries related to the discriminatory conditions (Appendix E, *infra,* 26a-27a). Accordingly, Mortenson claimed that he was discriminated against in the "terms, conditions, or privileges of sale or rental of a dwelling" in violation of (f)(2) (Appendix E, *infra,* 25a) and sought relief in the form of money damages.[3] (Appendix E, *infra,* 28a-29a).

On June 28, 1999, the defendants filed their Motion to Dismiss [Appellant's] First Amended Complaint in Intervention and, on June 30, 1999, a hearing was held on the motion to

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[1] Several properties owned by Respondents were the subject of the original complaint filed by the United States. References to "Rock Springs Vista" in this Petition, however, refer only to the property visited by Mr. Mortenson: Rock Springs Vista Number Seven.

[2] Other parties, who are not parties to this petition, also intervened. Furthermore, Mr. Mortenson sought relief under 42 U.S.C. § 3604(f)(1) but failed to plead that claim with sufficient particularity (having failed to allege in the First Amended Complaint in Intervention that he had sufficient financial means to purchase coupled with an interest in acquiring a condominium at Rock Springs Vista)and was not given leave to amend by the district court. The claims of these other parties and Mr. Mortenson's 42 U.S.C. § 3604(f)(1) claim are not the subject of this Petition.

[3] Mortenson also sought forms of equitable relief for his claim under 42 U.S.C. § 3604(f)(2), but those remedies are not the subject of this Petition.

dismiss.

On July 2, 1999, the district court entered its Order on Defendants' Motion to Dismiss [Appellant's] First Amended Complaint in Intervention. The district court held that the discriminatory structural conditions encountered by Mortenson (which encounter caused Mr. Mortenson intangible injuries) did not constitute "terms, conditions, or privileges that discriminate against Mortenson" (Appendix B, *infra*, 11a) and that, accordingly, Mortenson had "not alleged a particularized injury." (Appendix B, *infra*, 11a) Furthermore, the district court (apparently ignoring Mortenson's claim for money damages) held that Mortenson had "not alleged claims that are redressible." (Appendix B, *infra*, 11a).

After a timely appeal to the United States Court of Appeals for the Ninth Circuit, briefing, and oral argument on February 14, 2001, the circuit court of appeals entered its Memorandum on May 8, 2001, affirming the decision of the district court.[4] The Ninth Circuit held that: (1) Mortenson's allegations of "nominal" damages for intangible injuries were insufficient to constitute "actual" damages under the Fair Housing Act (Appendix A, *infra*, 2a-3a); and (2) Mortenson's injuries related to encountering inaccessible structural conditions a Rock Springs Vista did not constitute cognizable injuries under 42 U.S.C. § 3604(f)(2) (Appendix A, *infra*, 3a).

Mortenson subsequently moved for rehearing (Appendix F, *infra* 30a-37a), which motion was denied on July 5, 2001. (Appendix C, *infra*, 14a).

ARGUMENT

1. The Fair Housing Act ("FHA" or "the Act") was

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[4] Judge Johnnie B. Rawlinson, the judge in the district court, was a judge of the Ninth Circuit Court of Appeals in 2001. There is, however, no indication that she had any part in the deliberations regarding the case at the appellate level.

originally enacted in 1968 and prohibited discrimination based on race, color, religion and national origin. In 1988, Congress passed the Fair Housing Amendments Act (FHAA), thereby extending the Act's protections, and prohibiting discrimination based on disability[5] and familial status. The disabled were included as a protected group with regard to 42 U.S.C. § 3604(c) (relating to discriminatory advertising), 42 U.S.C. § 3604(d)(relating to discriminatory "steering" of protected persons), and 42 U.S.C. § 3604(e) (relating to "blockbusting").

Protection for the disabled was not extended by the FHAA to the remaining subsections, 42 U.S.C. § 3604(a) and 42 U.S.C. § 3604(b). Instead, a new subsection, 42 U.S.C. § 3604(f), was added to provide analogous protections. Thus, 42 U.S.C. § 3604(f)(1) (which prohibits discrimination in the sale or rental of a dwelling) is analogous to 42 U.S.C. § 3604(a). Similarly, 42 U.S.C. § 3604(f)(2)(which prohibits discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwelling") is analogous to 42 U.S.C. § 3604(b).

The new subsection, 42 U.S.C. § 3604(f), also provided additional definitions of "discrimination." 42 U.S.C. § 3604(f)(3) sets forth three definitions of discrimination that relate only to 42 U.S.C. § 3604(f)(1) and (f)(2). One of the definitions, at 42 U.S.C. § 3604(f)(3)(C), describes a minimum level of structural accessibility for the disabled and is the discrimination that was alleged in this case.[6]

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[5] As written, the Act refers to "handicap," a term that is generally disfavored. The term "disability," however, is currently preferred.

[6] The First Amended Complaint in Intervention contains a typographical error. In alleging discriminatory design and construction, Mr. Mortenson cited to 42 U.S.C. § 3604(f)(3)(B) instead of 42 U.S.C. § 3604(f)(3)(C). The district court, however, correctly understood that "[t]he amended complaint . . . added a claim alleging that Rock Springs discriminated against Plaintiffs in the terms, conditions, or privileges of sale or rental of a dwelling by *constructing and designing* condominiums

Although no circuit court of appeals has addressed the issue in a *reported* decision, the reported decisions of the district courts have uniformly held that design and construction discrimination (as defined under 42 U.S.C. § 3604(f)(3)(C)) constitutes "discrimination" for the purposes of 42 U.S.C. § 3604(f)(2). *See, Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.,* 40 F.Supp.2d 700, 705 (D.Md. 1999). (Design and construction requirements set forth at 42 U.S.C. § 3604(f)(3)(C) apply to violations of 42 U.S.C. § 3604(f)(2)); and *Montana Fair Housing, Inc. v. American Capital Development, Inc.,* 81 F.Supp.2d 1057, 1064 (D.Mont. 1999) (Disabled person without standing under 42 U.S.C. § 3604(f)(1) could have standing under 42 U.S.C. § 3604(f)(2) for design and construction discrimination if the disabled person has sustained "actual injury" precipitated by the design and construction discrimination).

The reported decisions do not provide any rationale for construing discriminatory design and construction (as described at 42 U.S.C. § 3604(f)(3)(C)) as applicable to violations of 42 U.S.C. § 3604(f)(2). The reason, however, is clear enough in the plain language of the statute.

When interpreting statutes, courts start with the plain meaning of the statute's language. *See, Patterson v. Shumate,* 504 U.S. 753, 757-59 (1992). When words in a statute are not otherwise defined, they are "interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States,* 444 U. S. 37, 42 (1979). The principal dictionary definition[7] of the word "condition" encompasses the physical

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that did not provided adequate accessability to the handicapped." (Appendix B, *infra,* 6a (emphasis added)).

[7] *E.g.*, "The particular mode or state of being of a person or thing.", THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, NEW COLLEGE EDITION, p. 277 (1976); and "The state in which a person or thing is." WORLD BOOK DICTIONARY, p. 433 (1995).

condition of structures.

To read the word "conditions" as used in 42 U.S.C. § 3604(f)(2) as being limited to conditions of a certain, non-structural, type (*e.g.*, contractual "conditions" or zoning "conditions") would narrowly construe the FHA. A narrow construction, however, is contrary to the Court's recognition of the Act's "broad and inclusive compass" and therefore is entitled to a "generous construction." *Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731(1995) (*quoting Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209, 212 (1972)).

In addition to the *reported* decisions of the district courts, the national policy of the U.S. Department of Housing and Urban Development (HUD) is to treat design and construction discrimination as actionable under 42 U.S.C. § 3604(f)(2). *See, HUD Memorandum of February 20, 1997, issued by Sara Pratt, Director, Office of Investigations (Subject: Standing in Accessibility Cases in Light of Ricks v. Beta Development Co., 1996 U.S. App. LEXIS 19743 (9th Cir. Aug. 1, 1996)*, (Appendix G, *infra* 38a-41a). The administrative construction of the Act by HUD is entitled to "great weight." *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972) (*citing Udall v. Tallman*, 380 U.S. 1, 16 (1965); and *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971)). Surprisingly, however, the Ninth Circuit did not chose to even address HUD's policy. Even more surprisingly, two reported decisions of the Ninth Circuit that were *authored* by Circuit Judge Procter Hug, Jr. (one of the members of the panel that heard the case at issue)clearly recognize the significance of HUD's interpretations of the FHA. *See, Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999)("The Secretary of Housing and Urban Development ('HUD') ordinarily commands considerable deference in interpreting the FHA because HUD is the federal agency primarily assigned to implement and administer Title VIII."); and *Holley v. Meyer*, 2001 WL 856093 (9th Cir., July 31, 2001) ("The Department of Housing and

Urban Development ('HUD'), the federal agency primarily assigned to implement and administer Title VIII, has developed regulations and guidelines, which this Court affords considerable deference . . . .").

2. In the context of the Fair Housing Act, "any person who claims to have been injured by a discriminatory housing practice" is an "aggrieved person" (42 U.S.C. § 3602(I)(1)) and "[a]n aggrieved person may commence a civil action . . . to obtain appropriate relief with respect to [a] discriminatory housing practice . . . ." 42 U.S.C. § 3613(a)(1)(A). In such a case, the relief which may be granted to the aggrieved person includes "actual and punitive damages" 42 U.S.C. § 3613(c)(1).[8] Accordingly, the redress available to private litigants under the FHA includes damages, a form of redress which is not extinguished by a plaintiff's ineligibility for injunctive relief.

Article III of the U.S. Constitution limits the federal courts' jurisdiction to "cases" and "controversies." *See, Raines v. Byrd*, 521 U.S. 811, 818 (1997). The Court has determined that "Congress intended standing under [the Fair Housing Act] to extend to the full limits of Art III." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 103, n 9, 109 (1979). Where the term "any person" is used (as it is in 42 U.S.C. § 3604(f)(2)), "the only requirement for standing to sue under [the Fair Housing Act] is the Art III requirement of injury in fact." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375-76 (1982). "As long as [plaintiffs] allege distinct and palpable injuries that are 'fairly traceable' to [defendants'] actions, the Art III requirement of injury in fact is satisfied." *Id.* at 376.

Clearly, Mortenson's injuries are "fairly traceable" to Respondents, and neither the district court nor the circuit court

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[8]The provisions of 42 U.S.C. § 3613 are applicable to intervenors in cases filed by the Attorney General by application of 42 U.S.C. § 3614(e) ("Intervention in civil actions").

of appeals held otherwise. Instead, both courts held that Mortenson has not alleged a "distinct and palpable injury" in that Mortenson had not alleged a "particularized injury," Appendix B, *infra,* 11a, or had not alleged an "injury specific to himself." Appendix A, *infra,* 3a. Such holdings are contrary to the Court's opinion in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375-76 (1982)), and the holdings of the courts of appeals for the Second Circuit, Seventh Circuit, Tenth Circuit, and Eleventh Circuit.

First, it is clear that, like the "statutorily created right to truthful housing information" provided by 42 U.S.C. § 3604(d) (*Havens* at 374), 42 U.S.C. § 3604(f)(2) creates a right to disabled-accessible housing[9] and, as discussed, *supra*, design and construction discrimination constitutes a violation of that right.

Next, it is clear that the circuit courts of appeals for at least four other circuits consider the *intangible* injuries associated with the emotional distress of being subjected to discrimination in violation of the FHA to be sufficiently "distinct and palpable" to provide the basis for relief (and, *a fortiori*, the basis for standing).[10] Among these cases are

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[9] The House Report from the Judiciary Committee, which was submitted along with the proposed FHAA, indicates that the purpose of 42 U.S.C. § 3604(f) is to create accessible housing "opportunities" for the disabled. H.R.REP. 100-711, 100TH CONG., 2ND SESS. (1988).

[10] See, e.g., *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 907 (2d Cir. 1993)("It is axiomatic that civil rights plaintiffs may recover compensatory damages for emotional distress."); *Tyus v. Urban Search Management*, 102 F.3d 256, 265 (7 th Cir. 1996) ("individual plaintiffs did not need to prove they suffered from a tangible injury."); *Morgan v. Secretary of Housing and Urban Dev.*, 985 F.2d 1451 (10th Cir. 1993) ("[E]motional distress damages are available in Fair Housing Act cases for distress which exceeds the normal transient and trivial aggravation attendant to securing suitable housing . . . ."); *Banai v. Secretary, U.S. Dept. of Housing*, 102 F.3d 1203, 1207 (11th Cir. 1997) ("Victims of discrimination in violation of the FHA are entitled to 'actual damages.'

awards to African-Americans of $2,500 for "emotional distress suffered as a result of viewing defendant's ads [for housing where the ads showed only white persons as models]" (*Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 907 (2d Cir. 1993)) and of "$2,000 as compensation for the emotional distress [that individuals who were *not* seeking housing] said they had suffered upon finding out they had been discriminated against [in the terms and conditions of rental]." *United States v. Balistrieri*, 981 F.2d 916, 926 (7th Cir. 1992).

Finally, it is clear that in civil rights cases, even "nominal damages" are sufficient to confer not merely standing upon plaintiffs, but also an award of attorney's fees.[11] *See,e.g., Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,* 532 U.S. ___, 121 S.Ct. 1835, 1840 (2001), *citing, Farrar v. Hobby*, 506 U.S. 103 (1992).

REASON FOR GRANTING THE PETITION

With regard to the first question presented, the Ninth Circuit has entered a decision on an important question of federal law in a manner that is in *direct* conflict with HUD's interpretation of the FHA and reported decisions of different district courts, and in *indirect* conflict with relevant decisions

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Although the statute provides little guidance beyond this statement, anger, embarrassment, and emotional distress are clearly compensable injuries under this standard.")

[11] This Court has recognized the importance of private enforcement efforts with regard to the FHA. *Traficante,* 409 U.S. at 211. In this case, Mortenson's administrative complaint and subsequent efforts in the federal courts have all been coordinated with a disabled rights advocacy organization having over 1,000 members. Thus, Mortenson has been acting as a "private attorney general" in this matter, and his counsel at oral argument before the Ninth Circuit described his injuries as "nominal" to emphasize that Mr. Mortenson was not looking for financial gain in this lawsuit, but that he was looking to enforce his rights under the FHA.

of this Court.

With regard to the second question presented, the Ninth Circuit has decided an important question of federal law in a manner that is in conflict with relevant decisions of this Court and of several United States courts of appeals.

The opinion presented for review, while not reported, is known to HUD. Consequently, administrative complaints of housing discrimination filed within the Ninth Circuit are being dismissed by HUD where the only injuries asserted are the intangible injuries of a disabled person acting as a "tester in a design and construction matter." *See, Letter, Dated June 27, 2001, of Richard F. Armknecht, III to Charles E. Hauptman, Director, HUD Office of Fair Housing and Equal Opportunity, Pacific/Hawaii, California State Office* (Appendix H, *infra,* 42a-45a, quotation from 43a). HUD's rationale for its dismissal of these complaints (where it made inquiries regarding the organization's injuries, but never the individual plaintiff's) is clearly based upon the district court's (and, now, the Ninth Circuit's) opinion that a tester in a design and construction matter cannot provide "evidence that he suffered a *direct* injury" where only intangible injuries are claimed. *See, Letter, Dated July 30, 2001, of Charles E. Hauptman, Director, HUD Office of Fair Housing and Equal Opportunity, Pacific/Hawaii, California State Office to Richard F. Armknecht, III* (Appendix I, *infra,* 46a-47a, quotation from 46a (emphasis added)).

Furthermore, in light of the Court's decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,* 532 U.S. ___, 121 S.Ct. 1835 (2001) and the elimination of the "catalyst theory" of awards for attorney's fees, individual civil rights plaintiffs will be placed at an extreme disadvantage if the availability of money damages for intangible injuries is effectively written out of a statute on the premise that those injuries are not sufficient to accord standing under Article III of the United States Constitution.

CONCLUSION

If Congress had wanted to limit the ability of the disabled to enforce the FHA, it would not have used the very broad "any person" phrase that it included in 42 U.S.C. § 3604(f)(2). The Ninth Circuit's holding that a disabled person's intangible injuries related to a violation of a statutorily created right essentially eliminates the right that Congress created by effectively stating that the disabled *cannot* be injured by violations. The intangible injuries sustained by disabled persons acting as "testers" are no less "real" than are similar injuries sustained by persons testing for other protected groups. Petitioner respectfully requests that this Honorable Court correct a plainly erroneous decision of the Ninth Circuit.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF
AND
MARK MORTENSON; DISABLED RIGHTS ACTION COMMITTEE, A UTAH NON-PROFIT CORPORATION
PLAINTIFFS-INTERVENORS-APPELLANTS
v.
ROCK SPRINGS SPRINGS VISTA DEVELOPMENT; J.A. BLACK CONSTRUCTION CO.; JAMES BLACK
DEFENDANTS-THIRD PARTY PLAINTIFFS-APPELLEES
AND
AURORA NOLD,
DEFENDANT-APPELLEE
THE KEITH COMPANY; VTN
THIRD-PARTY-DEFENDANTS-APPELLEES

No. 99-16754.
D.C. No. CV-01825-JBR (RLH)

Argued and Submitted Feb. 14, 2001.
Decided May 8, 2001.

Appeal from the United States District Court
for the District of Nevada
Johnnie B. Rawlinson, District Judge, Presiding.

Before HUG, NOONAN, and W. FLETCHER, Circuit Judges.

MEMORANDUM*

* This disposition is not appropriate for publication

and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

The United States filed a claim against Appellees, asserting that certain condominium complexes Appellees had constructed violated the provisions of the Fair Housing Act ("FHA") pertaining to handicapped people. Appellant Disabled Rights Action Committee ("DRAC"), a non-profit organization dedicated to ending discrimination against people with disabilities, and Appellant Mark Mortenson ("Mortenson"), a wheelchair user and member of DRAC, filed a complaint in intervention in this suit. The United States settled with Appellees. Appellees then filed a motion to dismiss Appellants' complaint in intervention for failure to state a claim. The district court granted the motion.

We hold that injunctive relief for Mortenson is not appropriate because he no longer lives in Nevada. We also hold that Mortenson's action for nominal damages must fail because he did not amend his complaint when given the opportunity to do so. We further hold that because Mortenson has no right to relief, DRAC similarly has no right to relief. Mortenson is the only individual member of DRAC involved in the suit and is therefore the only person who could support a right to relief for DRAC. We therefore affirm the district court.

DISCUSSION

Mortenson claims that "while ... searching for housing" in Nevada he visited a condominium complex developed by Appellee Rock Springs Vista Development Corp., Inc. That development, he alleged, contained "various inaccessible conditions" from which he "sustained certain intangible injuries."

Mortenson seeks injunctive relief as well as nominal but

not actual damages under the FHA. *See* 42 U.S.C. §§ 3604(f)(1), (f)(2). Mortenson's attorney stated at oral argument that the injunction sought would require the developer to provide money to encourage individual condominium owners to allow their condominiums to be made accessible, because the condominiums at issue had been sold to individual owners and therefore were no longer covered by 42 U.S.C. § 3603. Even if such relief were appropriate, Mortenson's claim for injunctive relief is moot because he no longer lives in Nevada, is no longer looking for housing in Nevada, and is therefore not in a position to benefit from any increase in the number of accessible units that might result. *Wilson v. Nevada,* 666 F.2d 378, 381-83 & n. 5 (9th Cir.1982).

Mortenson's claim for nominal damages fails as well because he failed to state a claim upon which such relief may be granted. Mortenson's amended complaint included no allegation of injury specific to himself. He failed to assert either that he was a bona fide "buyer or renter" of a condominium in the Rock Springs Vista development, 42 U.S.C. § 3604(f)(1), or that he was discriminated against in any "terms, conditions, or privileges of sale or rental of a dwelling, or [any] provision of services or facilities in connection with such dwelling ...." 42 U.S.C. § 3604(f)(2). The district court's order clearly identifies the facts that Mortenson would have to plead in order for his complaint to state a claim. Mortenson, however, failed to move to amend his complaint in order to include such allegations.

DRAC contends that it has representational standing, which requires that:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Associated Gen. Contractors of America v. Metro. Water Dist. of

S. Calif., 159 F.3d 1178, 1181 (9th Cir.1998). Mortenson, a member of DRAC, has failed to show that he has a right to relief in this case. Because he is the only member of DRAC who has attempted to establish a right to relief, DRAC does not have representational standing in this case.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-S-97-1825
Judge Johnnie B. Rawlinson

UNITED STATES OF AMERICA, Plaintiff,

ALLAN J. NOLD; AURORA NOLD; MARK MORTENSON; DONALD B. SHEFFER; AND DISABLED RIGHTS ACTION COMMITTEE (A UTAH NON-PROFIT CORPORATION); PLAINTIFFS-INTERVENORS

v.

ROCK SPRINGS VISTA DEVELOPMENT CORP.; J.A. BLACK CONSTRUCTION COMPANY; AND JAMES A. BLACK; DEFENDANTS.

ORDER

On June 1, 1998, Plaintiffs-Intervenors Mark Mortenson, Donald B. Sheffer, and the Disabled Rights Action Committee ("DRAC") filed a complaint in intervention (# 12) against Defendants Rock Springs Vista Development Corp., J.A. Black Construction Company, and James A. Black (jointly referred to hereinafter as "Rock Springs"). In their complaint, Plaintiffs allege that Mortenson and Sheffer require a wheelchair for mobility and each is accordingly a person with a "handicap" as defined by 42 U.S.C. § 3602(h). Plaintiffs allege that Rocks Springs designed and constructed Rock Springs Vista Condominium project numbers 7 and 9 (hereinafter referred to respectively as RSV # 7 and RSV # 9). Plaintiffs allege two

causes of action in their complaint pursuant to the Fair Housing Act (the "FHA," 42 U.S.C. §§ 3601-3631). Plaintiffs allege that Rock Springs discriminated against Plaintiffs in the sale or rental of housing by constructing and designing condominiums that did not provided adequate accessability to the handicapped. Plaintiffs also alleged that Rock Springs discriminated against Plaintiffs by representing to Mortenson and Sheffer that units at RSV # 7 and RSV # 9 were not available when in fact they were available.

On February 16, 1999, instead of answering the complaint, Rock Springs moved (# 45) to dismiss Plaintiffs' complaint in intervention. Rock Springs argues that Plaintiffs do not have standing to intervene, that the statute of limitations bars Plaintiffs' causes of action, and that Plaintiffs do not state a claim for discriminatory representations.

On March 2, 1999, Plaintiffs filed an amended complaint in intervention (# 51). The amended complaint omitted the claim for discriminatory representations but added a claim alleging that Rock Springs discriminated against Plaintiffs in the terms, conditions, or privileges of sale or rental of a dwelling by constructing and designing condominiums that did not provided adequate accessability to the handicapped.

On March 8, 1999, Plaintiffs opposed (# 53) Rock Springs' motion to dismiss. In their opposition, however, Plaintiffs acknowledged that they were no longer asserting a cause of action for discriminatory representations.

On March 22, 1999, Rock Springs replied (# 54) to Plaintiffs' opposition. Besides responding to Plaintiffs' arguments on standing and the statute of limitations, Rock Springs claims Plaintiffs' amended complaint is not properly before the court. Rock Springs asserts that Plaintiffs did not seek leave of the court before filing their amended complaint. Rock Springs argues that Plaintiffs were required to seek leave to amend because Rock Springs' motion to dismiss was a responsive pleading requiring Plaintiffs to seek prior permission.

On June 30, 1999, a hearing was held on Rock Springs' motion to dismiss. All parties were represented by counsel.

AMENDED COMPLAINT

Before determining the merits of Rock Springs' motion to dismiss, the Court will first determine the propriety of Plaintiffs' amended complaint. Rule 15(a) of the FRCP provides that a "party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served.... Otherwise a party may amend only by leave of court...." In *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.1995), the Ninth Circuit held that a "motion to dismiss is not a 'responsive pleading' within the meaning of [Rule 15(a)]" and "[n]either the filing nor granting of such a motion before answer terminates the right to amend...." As Rock Springs did not file a responsive pleading but only filed a motion to dismiss, Plaintiffs did not need leave to file an amended complaint. Because Plaintiffs are no longer asserting a claim for discriminatory representations, Rocks Springs' motion to dismiss that claim is moot.

MOTION TO DISMISS

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the claims asserted in the complaint. Accordingly, the allegations of material facts set forth in the complaint, with all reasonable inferences therefrom, are read in the light most favorable to the nonmoving party and are taken to be true. *Associated Gen. Contr. v. Metro. Water District*, 159 F.3d 1178, 1181 (9th Cir.1998) (citation omitted). Conclusory allegations of law and unwarranted inferences, however, are not sufficient to defeat a motion to dismiss. *Id.* The issue on a motion to dismiss for failure to state a claim is not whether the claimant will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th Cir.1997).

Consequently, a court may not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 248.

STANDING

Rock Springs argues that Plaintiffs' complaint be dismissed for lack of standing because Plaintiffs failed to allege an injury in fact traceable to a denial of their right to purchase or rent housing. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), the Supreme Court codified the "irreducible constitutional minimum of standing"; (1) injury in fact; (2) causation; and (3) redressability. An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (quotations omitted). Causation requires that the injury be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (quotation omitted). Redressability requires that it be " 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " Id. at 561. Plaintiffs claim injury under sections 3604(f)(1) and 3604(f)(2). Plaintiffs do not have standing under either section.

Section 3604(f)(1) makes it unlawful to "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling *to any buyer or renter* because of a handicap...." (Emphasis added). In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264 (1977), an individual plaintiff was held to have standing where his complaint alleged that "he [sought] and would qualify for the housing" that was the subject of the litigation. In the present case, Plaintiffs failed to allege that Mortenson, Sheffer, or members of the DRAC were prospective buyers, or that but for the architectural barriers in the condominium, they would have purchased a unit. Rather, their amended complaint

reflects merely a general interest in obtaining "suitable housing during 1995." Accordingly, Plaintiffs' complaint fails to allege a particularized injury. While it is true that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim," *Lujan*, 504 U.S. at 561, a plaintiff must still satisfy the minimum standing elements. By failing to indicate an intent to make an offer to purchase a particular condominium, Plaintiffs have failed to allege an injury in fact.

Plaintiffs contend that they were not required to allege an intent to make an offer because section 3604(f)(1), unlike section 3604(a), does not contain the language "after the making of a bona fide offer." While Plaintiffs are correct that they need not make a bona fide offer to achieve standing under 3604(f)(1), they must allege some interest in the condominium.

Plaintiffs argue that tester standing principles announced by the Supreme Court in *Havens Realty Corp. v. Coleman* 455 U.S. 363, 373-74 (1982), provide standing even though Plaintiffs do not have an actual interest in purchasing a condominium. In *Havens*, the Supreme Court relied on section 3604(d) to support the theory of tester standing. *Id.* Section 3604(d) makes it unlawful "[t]o represent to any person because of race, color, religion, sex, handicap, familial status or national origin that any dwelling is not available for inspection, sale or rental when such dwelling is in fact available" (emphasis added). The Supreme Court has expressly identified the language "to any person" as conferring broad standing. Section 3604(f)(1) employs the terms "renter or buyer" rather than "any person" suggesting that, at the very least, Plaintiffs must allege that they are prospective buyers of the subject condominium to achieve standing. *Cf. Havens*, 455 U.S. at 373 (by using the language "any person" in § 804(d), Congress conferred on all "persons a legal right to truthful

information about available housing").

Plaintiffs also fail to allege that Mortenson, Sheffer or members of the DRAC had sufficient financial means to purchase a condominium. This failure precludes the establishment of both the causation and redressability requirements. In *Warth v. Seldin*, 422 U.S. 490 (1975), the Supreme Court held that to have standing to challenge restrictive zoning practices as discriminatory, plaintiffs "must allege facts from which it reasonably could be inferred that, absent the ... restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease" in the area of restrictive zoning. *Id.* at 504. The Court found that the plaintiffs in *Warth* failed to establish the requisite causal connection as the record was "devoid of any indication that these projects or other like projects would have satisfied [plaintiffs'] needs at prices they could afford, or that, were the court to remove the obstructions ... such relief would benefit petitioners." *Id.* at 506.

In the present case, Plaintiffs also do not allege that units at RSV # 7 or RSV # 9 would satisfy their housing needs or that Mortenson, Sheffer, or the members of the DRAC have the means to purchase a unit at RSV # 7 or RSV # 9. Plaintiffs therefore failed to allege facts which support an actionable causal relationship between Rock Springs' alleged discriminatory actions and Plaintiffs' asserted injury.

Plaintiffs have also failed to establish redressability. If Plaintiffs are financially unable to purchase a condominium or if the units at RSV # 7 or RSV # 9 do not meet Plaintiffs' needs, then a court order directing the removal of architectural barriers will not afford Plaintiffs' relief. Under *Lujan,* "it must be 'likely,' as opposed to merely 'speculative,' that a favorable decision" will redress the injury. 504 U.S. at 561. The Court is not convinced that any remedial action ordered by the Court is "likely" to redress the injury alleged in the present case.

Section 3604(f)(2) makes it unlawful to "discriminate against any person in *terms, conditions, or privileges* of sale or

rental of a dwelling, or in the provision of services or facilities in connection with such dwelling because of a handicap...." (Emphasis added). Plaintiffs, however, do not allege any terms, conditions, or privileges that discriminate against Mortenson, Sheffer, or the DRAC. While Plaintiffs' allege that the actual units at RSV # 7 and RSV # 9 were not appropriately constructed, Plaintiffs' do not allege that any of the services or facilities connected with those units are discriminatory. Plaintiffs therefore have not alleged a particularized injury. Additionally, since Plaintiffs have not stated what terms, conditions, privileges, services or facilities are at issue, any action taken by the Court with respect to those unstated terms would be merely speculative. Plaintiffs therefore have not alleged claims that are redressible.

The DRAC alleges that it has standing under sections 3604(f)(1) and 3604(f)(2) based on its status as an organization. DRAC alleges standing based on three theories: (1) representational standing, (2) standing due to the deflection of time and money of the organization, and (3) standing due to the frustration of the organization's mission.

In *Legal Aid Soc. Of Hawaii v. Legal Services Corp.*, 145 F.3d 1017, 1030-31 (9th Cir.1998), the Ninth Circuit held that an association has representational standing "only if its members would have standing in their own right." (Citation omitted). The only members of the DRAC that are alleged to have standing are Mortenson and Sheffer. As set forth above, however, neither of these individuals has standing in this action. Accordingly, the DRAC cannot make a claim of representational standing.

In *Havens*, the Supreme Court held that for an organization to have standing in its own right under the Fair Housing Act, the court must conduct the same inquiry as in the case of an individual. 455 U .S. at 378. For the DRAC to have standing in its own right, it must also show (1) injury in fact; (2) causation; and (3) redressability. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-04, 118 S.Ct. 1003, 1016-1017

(1998).

The injury alleged by DRAC in Plaintiffs' amended complaint is that due to this litigation, the DRAC has had to divert its scare resources from other efforts. In *Spann v. Colonial Village*, 899 F.2d 24, 27 (D.C.Cir.1990) cert. denied 498 U.S. 980 (1990), the D .C. Circuit summarized Havens when holding "that an organization establishes Article III injury if it alleges that purportedly illegal action increases the resources the group must devote to programs *independent of its suit challenging the action*." Citing *Havens*, 455 U.S. at 379 (emphasis added). The Court reasoned that an "organization cannot ... manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit. Were the rule otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real limitation." 889 F.2d at 27.

The only injury alleged by the DRAC in Plaintiffs' amended complaint is injury to itself caused by bringing this lawsuit. Such injury is insufficient to provide standing. *See Fair Housing Council v. Montgomery Newspapers*, 141 F.3d 71, 79 (3rd Cir.1998) (litigation expenses alone do not constitute damage sufficient to support standing); *see also Steel Co.*, 523 U.S. at 107-08, 118 S.Ct. at 1019 (no standing to litigate a substantive issue when investigation and prosecution costs of the lawsuit are the only injuries).

The DRAC alleges in its opposition, however, that it has standing because Rocks Springs' actions have frustrated its mission of ensuring equal housing opportunities. The DRAC, however, does not allege any facts to show a "concrete and demonstrable injury to the organization's activities." *Havens*, 455 U.S. at 379. At best, the DRAC has demonstrated a "setback to [its] abstract social interests," which does not suffice to confer standing. *Havens*, 455 U.S. at 379 (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)).

At the hearing, Plaintiffs also gave no indication that they would be able to allege sufficient facts so as to provide

standing. This Court concludes, therefore, that dismissal of Plaintiffs' amended complaint is appropriate. Because this Court has determined that Mortenson, Sheffer, and the DRAC do not have standing, this Court declines to address the statute of limitations question. Accordingly,

IT IS ORDERED that Rock Springs' motion to dismiss (# 45) is GRANTED.

IT IS FURTHER ORDERED that Sheffer, Mortenson and the DRAC's amended complaint in intervention (# 51) is dismissed for lack of standing.

IT IS ALSO ORDERED the Clerk shall enter judgment accordingly.

DATED this 2nd day of July 1999.

/s/JOHNNIE B. RAWLINSON
JOHNNIE B. RAWLINSON
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF
AND
MARK MORTENSON; DISABLED RIGHTS ACTION COMMITTEE, A UTAH NON-PROFIT CORPORATION
PLAINTIFFS-INTERVENORS-APPELLANTS
v.
ROCK SPRINGS SPRINGS VISTA DEVELOPMENT; J.A. BLACK CONSTRUCTION CO.; JAMES BLACK
DEFENDANTS-THIRD PARTY PLAINTIFFS-APPELLEES
AND
AURORA NOLD,
DEFENDANT-APPELLEE
THE KEITH COMPANY; VTN
THIRD-PARTY-DEFENDANTS-APPELLEES

No. 99-16754.
D.C. No. CV-01825-JBR (RLH)

Filed July 5, 2001.

ORDER

Before: HUG, NOONAN, and W. FLETCHER, Circuit Judges.

Appellant's petition for rehearing, filed May 31, 2001, is hereby DENIED.

APPENDIX D

CONSTITUTION OF THE UNITED STATES

ARTICLE III

* * * * *

SECTION 2. The judicial Power of the United States, shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority; - to all Cases affecting ambassadors, other public Ministers and Counsuls; - to all Cases of admiralty and maritime Jurisdiction;- to Controversies to which the United States shall be a party;- to Controversies between two or more States;- between a State and Citizens of another State;- between Citizens of different States;- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. * * *

* * * * *

THE FAIR HOUSING ACT, 42 U.S.C. 3601 *ET SEQ.*

§ 3602. Definitions

As used in this subchapter –

* * *

(i) "Aggrieved person" includes any person who –

(1) claims to have been injured by a discriminatory housing practice * * *

§ 3604. Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful –

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation,

or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of -

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

(f)(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of -

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

(f)(3) For purposes of this subsection, discrimination includes -

(A) * * *:

(B) * * *; or

(C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that -

(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(f)(4) * * *

(f)(5) * * *

(f)(6) * * *

(f)(7) As used in this subsection, the term "covered multifamily dwellings" means -

(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and

(B) ground floor units in other buildings

consisting of 4 or more units.

(f)(8) * * *
(f)(9) * * *

§ 3613. Enforcement by private persons

(a) Civil Action

(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

(B) The computation of such 2-year period shall not include any time during which an administrative proceeding under this subchapter was pending with respect to a complaint or charge under this subchapter based upon such discriminatory housing practice. This subparagraph does not apply to actions arising from a breach of a conciliation agreement.

(2) An aggrieved person may commence a civil action under this subsection whether or not a complaint has been filed under section 3610(a) of this title and without regard to the status of any such complaint, but if the Secretary or a State or local agency has obtained a conciliation agreement with the consent of an aggrieved person, no action may be filed under this subsection by such aggrieved person with respect to the alleged discriminatory housing practice which forms the basis for such complaint except for the purpose of enforcing the terms of such an agreement.

* * * * *

(c) Relief which may be granted

(1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d) of this section, may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

(2) In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

* * * * *

§ 3614. Enforcement by Attorney General

* * * * *

(e) Intervention in civil actions

Upon timely application, any person may intervene in a civil action commenced by the Attorney General under subsection (a) or (b) of this section which involves an alleged discriminatory housing practice with respect to which such person is an aggrieved person or a conciliation agreement to which such person is a party. The court may grant such appropriate relief to any such intervening party as is authorized to be granted to a plaintiff in a civil action under section 3613 of this title.

APPENDIX E

RICHARD F. ARMKNECHT, III
Nevada Bar Number 5205
7862 South Danish Downes Court
Salt Lake City, Utah 84121
(801) 942-3659

Attorney for Intervenors
Mark Mortenson, Donald B. Sheffer, and
Disabled Rights Action Committee

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

* * * *

CASE NO.: CV-S-97-1825-JBR(RLH)

UNITED STATES OF AMERICA,
Plaintiff,

ALLAN J. NOLD; AURORA NOLD;
MARK MORTENSON; DONALD B. SHEFFER;
and DISABLED RIGHTS ACTION COMMITTEE
(a Utah non-profit corporation),
Intervenors,

vs.

ROCK SPRINGS VISTA DEVELOPMENT CORP., INC.;
J.A. BLACK CONSTRUCTION COMPANY, INC.; and
JAMES A. BLACK,
Defendants/Respondents.

FIRST AMENDED COMPLAINT IN INTERVENTION
(Jury Trial Demanded)

In accordance with FRCP 15(a), Intervenors MARK MORTENSON (MORTENSON), DONALD B. SHEFFER (SHEFFER), and DISABLED RIGHTS ACTION COMMITTEE (a Utah non-profit corporation) (DRAC), file this, their First Amended Complaint in Intervention, by and through their attorney, RICHARD F. ARMKNECHT, III, and for their claims for relief against Defendants ROCK SPRINGS VISTA DEVELOPMENT CORP., INC.; J.A. BLACK CONSTRUCTION COMPANY, INC.; and JAMES A. BLACK, allege as follows:

JURISDICTION AND VENUE

1. The United States of America, the original plaintiff herein, filed a complaint herein on December 15, 1997, against the above-named defendants, to enforce the Fair Housing Act as amended, 42 U.S.C. Secs. 3601-3619 and seeking damages for all aggrieved persons under 42 U.S.C. Sec. 3614(d)(1)(B).

2. The original Defendants herein filed their answer in the original action herein on February 27, 1998, denying allegations and asserting affirmative defenses. Intervenors' Complaint in Intervention was filed on June 1, 1998. To date, no responsive pleading has been filed by Defendants regarding Intervenors' Complaint in Intervention.

3. MORTENSON, SHEFFER, and DRAC, Intervenors herein, allege injury due to violations of the design and construction requirements of the Fair Housing Act and its regulations and seek damages, declaratory judgment and permanent injunctive relief for Defendants' violations of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. § 3601 et seq. The Court's jurisdiction over this action is predicated upon 28 U.S.C. §§ 1331, 1343, 1345, and 42 U.S.C. §3614. Declaratory relief is sought under 28 U.S.C. §§ 2201(a) and 2202. Intervenors intervene as of right under 42 U.S.C. §3614(e).

4. Venue of this action is appropriate in the United States District Court for the District of Nevada, Southern Division, pursuant to 28 U.S.C. § 1391 as the claims arose in such district and, further, as Defendants conduct business in such district.

THE PARTIES

5. Intervenors MORTENSON and SHEFFER are natural persons who were residing in southern Nevada in 1995, but who have since moved out of the state. Both MORTENSON and SHEFFER require a wheelchair for mobility, and each is accordingly a person with a "handicap" as such term is defined under the Fair Housing Act (42 U.S.C. § 3602(h)).

6. Intervenor, DISABLED RIGHTS ACTION COMMITTEE is a Utah non profit corporation organized with the principal purpose of helping to eliminate discrimination against individuals with disabilities by ensuring compliance with laws intended to provide access to housing, public buildings, transportation, goods and services. The Fair Housing Act constitutes such a law. DRAC is qualified as a charitable organization under 26 U.S.C. § 501(c)(3). Members of DRAC are primarily individuals with disabilities and persons related to individuals with disabilities. DRAC's membership includes residents of Nevada. Most of DRAC's Nevada members reside in Clark County, Nevada. As a result of their disabilities, certain accommodations are necessary to allow DRAC's members access to housing, which access is required under the Fair Housing Act. In order to litigate this matter, DRAC has had to divert its scarce resources from other efforts to promote awareness of -- and compliance with -- federal and state accessibility laws.

7. Defendant, ROCK SPRINGS VISTA DEVELOPMENT CORP., INC. (ROCK SPRINGS) is a Nevada corporation doing business in Clark County, Nevada. ROCK SPRINGS' was responsible, in whole or in part, for the design, development, construction, and sale of the multifamily dwellings commonly known as "ROCK SPRINGS VISTA #7"

and "ROCK SPRINGS VISTA # 9" and hereinafter referred to as RSV #7 and RSV # 9. ROCK SPRINGS VISTA DEVELOPMENT CORPORATION, a Nevada corporation, is the builder of the RSV #7 (the condominium development visited by MORTENSON during his search for suitable housing during 1995) and RSV # 9 (the condominium development which came to the attention of SHEFFER -- including its inaccessibility -- during SHEFFER's search for suitable housing during 1995).

8. Defendant J.A. BLACK CONSTRUCTION COMPANY, INC. (BLACK CONSTRUCTION) is a Nevada corporation doing business in Clark County, Nevada. BLACK CONSTRUCTION was responsible, in whole or in part, for the design and construction of RSV #7 and RSV # 9.

9. Defendant JAMES A. BLACK (Mr. BLACK) is an individual who, on information and belief, resides in Clark County, Nevada. Mr. BLACK was responsible, in whole or in part, for the design and construction of RSV #7 and RSV # 9.

FIRST CAUSE OF ACTION

(Discrimination Against Prospective Buyers)

10. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 9 hereof, and incorporate the same herein by reference.

11. The Fair Housing Act (at 42 U.S.C. § 3604(f)(1)) prohibits persons from discriminating "in the sale or rental, or otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of . . . any person associated with that buyer or renter."

12. Under the Fair Housing Act (at 42 U.S.C. §3604(f)(3)(B)) the term "discrimination" includes, in connection with the design and construction of covered multifamily dwellings for first occupancy after March 13, 1991, a failure to design and construct those dwellings so as to include for certain minimum features allowing adequate accessibility.

13. Under the Fair Housing Act (at 42 U.S.C. § 3604(f)(7)) the term "covered multifamily dwellings" is defined (in the case of buildings having no elevators such as those found at both RSV #7 and RSV # 9) as "ground floor units in . . . buildings consisting of 4 or more units." The buildings found at RSV #7 and RSV # 9 consist of 4 or more units.

14. On information and belief, the buildings found at RSV #7 and RSV # 9 were constructed for first occupancy after March 13, 1991.

15. Examples of discrimination under the Fair Housing Act (at 42 U.S.C. § 3604(f)) found at RSV #7 and RSV # 9 include (but are not limited to):

(a) Defendants' construction of covered units having inaccessible doorways (doorways that measure less than 32 inches net free clear are inaccessible and the bathroom doorway is only 28 inches net free clear and the bedroom doorways are only 30 inches net free clear).

(b) Defendants' construction of covered units having inaccessible thermostats.

(c) Defendants' construction of covered units having inaccessible door hardware (doorknobs vice lever-type handles).

(d) Defendants' construction of covered units having inaccessible public use and common use areas.

SECOND CAUSE OF ACTION

(Discrimination in Terms and Conditions of Sale)

16. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 15 hereof, and incorporate the same herein by reference.

17. The Fair Housing Act (at 42 U.S.C. §3604(f)(2)) prohibits persons from engaging in discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwelling."

18. Under the Fair Housing Act (at 42 U.S.C.

§3604(f)(3)(B)) the term "discrimination" includes, in connection with the design and construction of covered multifamily dwellings for first occupancy after March 13, 1991, a failure to design and construct those dwellings so as to include for certain minimum features allowing adequate accessibility.

19. Under the Fair Housing Act (at 42 U.S.C. § 3604(f)(7)) the term "covered multifamily dwellings" is defined (in the case of buildings having no elevators such as those found at both RSV #7 and RSV # 9) as "ground floor units in . . . buildings consisting of 4 or more units." The buildings found at RSV #7 and RSV # 9 consist of 4 or more units.

20. On information and belief, the buildings found at RSV #7 and RSV # 9 were constructed for first occupancy after March 13, 1991.

21. Examples of discrimination under the Fair Housing Act (at 42 U.S.C. § 3604(f)) found at RSV #7 and RSV # 9 include (but are not limited to):

(a) Defendants' construction of covered units having inaccessible doorways (doorways that measure less than 32 inches net free clear are inaccessible and the bathroom doorway is only 28 inches net free clear and the bedroom doorways are only 30 inches net free clear).

(b) Defendants' construction of covered units having inaccessible thermostats.

(c) Defendants' construction of covered units having inaccessible door hardware (doorknobs vice lever-type handles).

(d) Defendants' construction of covered units having inaccessible public use and common use areas.

22. Defendants' conduct, described above, was intentional, malicious and taken in disregard of the rights afforded individuals under the Fair Housing Act.

23. As a result of the Defendants' unlawful actions, MORTENSON and SHEFFER have been injured by (a) having

been denied the full range of housing opportunities afforded under law, (b) having been denied the opportunity to live in an integrated area where disabled individuals are not excluded by inaccessible design and construction, (c) having endured such frustration, mental anguish, humiliation, and embarrassment as is concomitant with being treated as a "second class citizen." Also, in order to litigate this matter, DRAC has had to divert its scarce resources from other efforts to promote awareness of -- and compliance with -- federal and state accessibility laws.

24. It has been necessary for Intervenors to retain the services of counsel in order to pursue this action and Intervenors are entitled to reasonable attorney's fees, together with costs of suit incurred herein.

DECLARATORY RELIEF

25. This is an action for declaratory judgment pursuant to 28 U.S.C. § 2201 for the purpose of determining a question of actual controversy between Plaintiffs and Defendants.

26. Plaintiffs are entitled to a declaratory judgment concerning each of Defendants' Fair Housing Act violations and specifying the rights of the Plaintiffs as to their opportunity to reside at RSV #7 and RSV #9.

JURY TRIAL DEMANDED

Intervenors demand a jury trial with regard to any and all causes of action described in this First Amended Complaint and which may be tried before a jury.

PRAYER FOR RELIEF

WHEREFORE, Intervenors pray for judgment as follows:

On their First Cause of Action:

(a) declaring Defendants' failure to design and construct RSV #7 and RSV # 9 in such a manner that they are readily accessible to and usable by individuals with handicaps constitutes unlawful discrimination in violation of the Fair

Housing Act;

(b) permanently enjoining Defendants, their agents, employees and assigns from discrimination on the basis of handicap in violation of the Fair Housing Act, and requiring Defendants to make all necessary modifications to eliminate all barriers that prevent access by persons with handicaps;

(c) for actual damages in an amount to be proved at trial;

(d) for an award of punitive damages;

(e) for payment for necessary modifications to any condominium at RSV #7 and RSV # 9 where the owner of such condominium desires that such unit be brought into compliance with the Fair Housing Act;

(f) for the establishment of an escrow fund in an amount deemed appropriate by the Court for expenditures to bring all condominiums at RSV #7 and RSV # 9 into compliance with the Fair Housing Act over a term of years (and, at the conclusion of such term of years, for expenditures to improve accessibility to the disabled in Nevada according to such terms and conditions as are deemed appropriate by the Court);

(g) for Intervenors' attorney's fee, including litigation expenses, and costs of suit; and

(h) for such other and further relief deemed appropriate by the Court.

On their Second Cause of Action:

(a) declaring Defendants' failure to design and construct RSV #7 and RSV # 9 in such a manner that they are readily accessible to and usable by individuals with handicaps constitutes unlawful discrimination in violation of the Fair Housing Act;

(b) permanently enjoining Defendants, their agents, employees and assigns from discrimination on the basis of handicap in violation of the Fair Housing Act, and requiring Defendants to make all necessary modifications to eliminate all barriers that prevent access by persons with handicaps;

(c) for actual damages in an amount to be proved at trial;

(d) for an award of punitive damages;

(e) for payment for necessary modifications to any condominium at RSV #7 and RSV # 9 where the owner of such condominium desires that such unit be brought into compliance with the Fair Housing Act;

(f) for the establishment of an escrow fund in an amount deemed appropriate by the Court for expenditures to bring all condominiums at RSV #7 and RSV # 9 into compliance with the Fair Housing Act over a term of years (and, at the conclusion of such term of years, for expenditures to improve accessibility to the disabled in Nevada according to such terms and conditions as are deemed appropriate by the Court);

(g) for Intervenors' attorney's fee, including litigation expenses, and costs of suit; and

(h) for such other and further relief deemed appropriate by the Court.

DATED this 27th day of February, 1999.

/s/RICHARD F. ARMKNECHT, III
Richard F. Armknecht, III, Esq.
Nevada Bar Number 5205

APPENDIX F

CASE NO.: 99-16754

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff,

ALAN J. NOLD; AURORA NOLD;
Plaintiff-Intervenors, and

MARK MORTENSON
and DISABLED RIGHTS ACTION COMMITTEE,
a Utah nonprofit corporation,
Plaintiff-Intervenors-Appellants

v.

ROCK SPRINGS VISTA DEVELOPMENT CORP., INC.; et. al.,
Defendants - Third-party Plaintiffs - Appellees, and

THE KEITH COMPANY; VTN
Third-party Defendants - Appellees.

CASE NO.: 99-16754
(An Appeal from the U.S. District Court for the District of Nevada)

APPELLANTS' PETITION FOR REHEARING

I. Purpose

The purpose of this Petition for Rehearing is to direct

the Court's attention to material points of fact overlooked in the Court's Memorandum decision (filed May 8, 2001) or (if such material points of fact were not overlooked, but have been deemed to be "dross" due to the Court's view of applicable law) to apparent conflicts with other decisions of the Court which were not addressed in the opinion.

The Court's decision to affirm the district court's failure to grant Mortenson leave to amend his claim under 42 U.S.C. § 3604(f)(1) (hereinafter, all section numbers refer to sections of Title 42 of the United States Code) appears to be at odds with the:

> line of cases stretching back 50 years [where the Ninth Circuit has] held that in dismissing for failure to state a claim under Rule 12(b)(6), 'a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.'

Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000) (en Banc decision), *quoting* Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995).

Nevertheless, Mortenson and DRAC *do not* ask this Court to review its decision with regard to the district court's failure to grant leave to amend: the Court's valuable time would certainly be better spent on matters that will have a *significant* impact on the private enforcement of the design and construction requirements of the Fair Housing Act. Accordingly, the purpose of this Petition for Rehearing is limited to Mortenson's claim under 3604(f)(2) – a claim involving only a small amount of damages, but involving a significant question of law: does 3604(f)(2) provide a cause of action to a "tester" seeking to ensure compliance with the design and construction requirements set forth at 3604(f)(3)(C)? This critical question, which was briefed at

length by the parties on appeal, is not addressed in the panel's decision.

II. Introduction

In the judgment of the undersigned counsel for Mortenson and DRAC, one or more of the situations described above (in the first paragraph of the "Purpose" section) exist in this case. Specifically, the following material points of fact were overlooked: (1) The First Amended Complaint asserts that Mortenson was discriminated against in the terms, conditions, or privileges of sale of a dwelling."; (2) The First Amended Complaint asserts that Mortenson was discriminated against in the provision of facilities in connection with a dwelling; (3) The First Amended Complaint included allegations of injury specific to Mortenson.; and (4) In the First Amended Complaint, Mortenson sought actual damages.[1]

Some situations (regarding conflicts with other decisions of the Court) are described below, but may not actually exist if the Court has, in fact, overlooked material facts and has not discounted those facts based upon a legal rationale at conflict with caselaw of the Ninth Circuit and the U.S. Supreme Court.

The following conflicts with other decisions of the Court, or the Supreme Court, (which were not addressed in the decision) may exist: (1) Even "nominal" damages are sufficient to confer standing in civil rights cases; (2) "Intangible" injuries constitute "actual" injuries; (3) The term 'any person' is very broad; (4) the definition of "discrimination" set forth at

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[1] Although perhaps not a material fact, the procedural history recited in the opinion erroneously states that "The United States settled with Appellees" prior to the motion to dismiss. In fact, the settlement came after the dismissal. Thus, DRAC was completely denied a "place at the table" in the settlement and was not able to represent its disabled members living in Las Vegas whose housing opportunities have been diminished by the design and construction violations at Rock Springs Vista #7.

3604(f)(3) plainly applies to 3604(f)(2); (5) The Fair Housing Act is entitled to a "generous construction."; and (6) Where the term "any person" is used, "the only requirement for standing to sue under [the Fair Housing Act] is the Art III requirement of injury in fact."

III. Overlooked Material Points of Fact

A. The First Amended Complaint asserts that Mortenson was discriminated against in the "terms, conditions, or privileges of sale or rental of a dwelling." *See*, First Amended Complaint, *at* heading before paragraph 16 ("SECOND CAUSE OF ACTION (Discrimination in Terms and Conditions of Sale)"); *at* paragraph17 ("The Fair Housing Act (at 42 U.S.C. §3604(f)(2)) prohibits persons from engaging in discrimination 'against any person in the terms, conditions, or privileges of sale or rental of a dwelling.'"); and *at* paragraph 23 ("As a result of the Defendants' unlawful actions, MORTENSON [has] been injured by (a) having been denied the full range of housing opportunities afforded under law, (b) having been denied the opportunity to live in an integrated area where disabled individuals are not excluded by inaccessible design and construction, (c) having endured such frustration, mental anguish, humiliation, and embarrassment as is concomitant with being treated as a 'second class citizen.'")

B. The First Amended Complaint asserts that Mortenson was discriminated against in the provision of facilities in connection with a dwelling. *See*, First Amended Complaint, paragraph 15(d) ("Defendants' construction of covered units having inaccessible public use and common use areas.") (Excerpts of Record, 5).

C. Mortenson's amended complaint included allegations of injury specific to him. *See*, First Amended Complaint, paragraph 23 (quoted above). The

allegation of injury specific to Mortenson was listed as item 6 of the "Facts Relevant to Issues Presented for Review" on pages 7-8 of the "Brief of Appellant," and was not questioned by Appellees. *See also,* the Court's opinion which (on page 3) notes that Mortenson alleged that he "sustained certain intangible injuries" but (on page 4) contradicts itself and states that "Mortenson's amended complaint included no allegation of injury specific to himself." Even the Brief of the Appellee (at page 22) notes that Mortenson had claimed "that alleged discrimination within the Rock Springs Vista development caused him injury."

D. Mortenson sought actual damages in the First Amended Complaint. *See,* First Amended Complaint, page 8 at "(c)" (on the 3604(f)(1) claim, Mortenson sought "actual damages in an amount to be proved at trial"); and page 9 at "(c)" (on the 3604(f)(2) claim, Mortenson sought "actual damages in an amount to be proved at trial") (Excerpts of Record, pages 8 and 9). At oral argument, counsel for Mortenson -- in an effort to emphasize the importance of injunctive relief in this case -- informed the Court that Mortenson's damages were only "nominal." Such choice of terminology at oral argument, (where counsel is speaking "off the cuff") should not be determinative of the outcome of a case. The term "nominal damages" was used where "modest damages" would have been more *apropos*. In the estimation of the undersigned, the damages available to Mortenson would probably be in the range of $2,000 (the amount of the jury award made to each of certain fair housing testers and affirmed in United States v. Balistrieri, 981 F.2d 916 (7th Cir. 1992)).

IV. Conflicts With Controlling Caselaw

The apparent conflicts identified assume that the Court apprehended the material facts identified above, but deemed such facts as immaterial due to a legal analysis which conflicts

(in some respect) with one or more of these material points of law (and related Ninth Circuit and Supreme Court caselaw).

A. Even "nominal" damages are sufficient to confer standing in civil rights cases. *See, e.g.*, Farrar v. Hobby, 506 U.S. 103, 109 (1992).

B. "Intangible" injuries constitute "actual" injuries. *See, e.g.*, Johnson v. Hale, 13 F.3d 1351, 1352 (9th Cir. 1994).

C. "The term 'any person' is quite broad . . . In its conventional usage, 'any' means 'ALL -- used to indicate a maximum or whole.' It certainly does not mean 'some.'" Hertzberg v. Dignity Partners, Inc., 191 F.3d 1076, 1080 (9th Cir. 1999) (opinion by Judge William A. Fletcher) (citations omitted).

D. The definition of "discrimination" set forth at 3604(f)(3) applies to 3604(f)(2). *See,* City of Edmonds v. Washington State Bldg. Council, 18 F.3d 802, 804 (9th Cir. 1994) *affd. sub nom* City of Edmonds v. Oxford House, Inc. 514 U.S. 725 (1995).

E. "Courts generously construe the Fair Housing Act." *See,* City of Edmonds v. Washington State Bldg. Council, 18 F.3d 802, 804 (9th Cir. 1994) *affd. sub nom* City of Edmonds v. Oxford House, Inc. 514 U.S. 725 (1995).

F. Where the term "any person" is used, "the only requirement for standing to sue under [the Fair Housing Act] is the Art III requirement of injury in fact." Havens Realty Corp. v. Coleman, 455 U.S. 363, 375-76 (1982). "As long as [plaintiffs] allege distinct and palpable injuries that are 'fairly traceable' to [defendants'] actions, the Art III requirement of injury in fact is satisfied." Id. at 376.

V. Discussion

In order to state a claim under 3604(f)(2), a party must assert an injury due to a violation of 3604(f)(2), which injury was caused by the conduct of the defendant and which injury

may be redressed by the court. Mortenson asserted emotional distress injuries (injuries which are clearly particular to Mortenson) due to Rock Springs Vista's violation of 3604(f)(2).

What the district court pronounced (and what this Court has affirmed) is effectively the elimination of "tester" standing for the enforcement of the design and construction provisions of the Fair Housing Act. This elimination of tester standing has not been accomplished by a narrow interpretation of the "any person" language of 3604(f)(2). Rather, the district court (on its own initiative) chose to narrowly construe the cause of action provided by 3604(f)(2) to exclude design and construction discrimination.

As was noted at oral argument, the effect of a narrow construction of 3604(f)(2) is not limited to testers – it can also preclude an *owner and resident* of a condominium (who became disabled after the purchase of a condominium) from obtaining relief under 3604(f)(2). Certainly, Mortenson and DRAC are disappointed that the Court has decided to depart from its well established precedent regarding dismissal without granting leave to amend. Such holding, however, does not cast a cloud over the enforcement abilities of the disabled in general. A narrow interpretation of 3604(f)(2) *does* cast such a cloud as any reader of the Court's opinion (who has a copy of the First Amended Complaint for reference) is left with just one conclusion:[2] the Court has applied a rule of law that renders inconsequential the allegations of the First Amended Complaint. But what rule of law is being applied? Based upon what was argued on brief and at oral argument, it would seem to be a *new* rule of law. Thus, the "cloud" cast by the opinion is substantial.

Appellees urge this Honorable Court to take a second

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[2] After eliminating, as absurd, the possibility that the Court would exercise deliberate blindness with regard to the allegations of the First Amended Complaint.

look at the allegations of the First Amended Complaint. In it, the Court will find that Mortenson has alleged injuries particular to him (which injuries were caused as the direct result of Rock Springs Vista's discrimination, as defined at 3604(f)(3)(C)) and has asked for "actual damages" as redress to those injuries. Once the Court takes notice of the allegations made in the First Amended Complaint, the law is clear: Mortenson's claim for damages (even though small in amount) should survive dismissal, the case should be remanded to the district court for further proceedings and the disabled community's power to fight for its own rights will be restored.

VI. Conclusion

In short, important issues of law (the scope of 3604(f)(2) and its enforcement through "testers") have been brought before this Honorable Court. Those issues (which are not dependent upon any amendment of the First Amended Complaint) cry out for the meaningful clarification that this panel, through its members' study of the issues involved (as was demonstrated at oral argument) can provide.

Respectfully Submitted this 19th day of May, 2001.

s/RICHARD F. ARMKNECHT, III
RICHARD F. ARMKNECHT, III, ESQ.
7862 South Danish Downes Court
Salt Lake City, Utah 84121
(801) 942-3804

APPENDIX G

U.S. DEPARTMENT
OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-2000
FEB 20 1997 [stamped date]

(Department's SEAL)

OFFICE OF THE ASSISTANT SECRETARY
FOR FAIR HOUSING AND EQUAL OPPORTUNITY

MEMORANDUM FOR:
All Fair Housing Enforcement Center Directors
All Program Operations and Compliance
Center Directors (Large and Small)

s/SARA PRAT
FROM: Sara Prat, Director, Office of Investigations
SUBJECT: Standing in Accessibility Cases in Light of Ricks v. Beta Development Co., 1996 U.S. App. LEXIS 19743 (9th Cir. Aug. 1, 1996).

This memorandum discusses standing under paragraphs 804(f)(1) and (2) of the Fair Housing Act ("Act"). It advises that, under paragraph 804(f)(1), complaints against respondents who allegedly failed to design and construct accessible housing should be dismissed where the complainant did not have the interest in living in and/or the financial means to live at the housing. Such complaints should be investigated as possible violations of paragraph 804(f)(2).

The United States Court of Appeals for the Ninth

Circuit recently addressed the issue of standing under paragraph 804(f)(1) of the Act in the above-referenced case.[1] (Copy attached.) That provision makes it unlawful to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any "buyer or renter" because of the handicap of, among other persons, that buyer or renter or a person intending to reside in the dwelling after it is sold or rented. 42 U.S.C. § 3604(f)(1). Discrimination includes failing to design and construct covered multifamily dwellings so as to meet the Act's accessibility requirements. 42 U.S.C. § 3604(f)(3)(C). The Ricks decision makes clear the importance of showing a causal relationship between the alleged discriminatory action and the asserted injury under paragraph 804(f)(1).

Plaintiff Jeff Ricks, a disabled person, had alleged that the developer and designer of The Fountains at Makiki failed to design and construct the complex in accordance with the Act's accessibility requirements. The court of appeals upheld the district court's dismissal of the complaint, because Mr. Ricks had failed to allege sny intent to purchase a condominium, i.e., either "that he was a prospective buyer or that but for the architectural barriers in the condominium, he would purchase a unit." The court noted further that Mr. Ricks had failed to allege even that he could afford to purchase a condominium at The Fountains.

Accordingly, investigations of complaints based on paragraph 804(f)(1) should take care to develop evidence of "a particularized injury." The complainant should be asked to provide evidence showing that he/she actually was interested in purchasing a unit and could afford to do so. In addition, the complainant should provide evidence of how

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[1] The court did not address paragraph 804(f)(2).

he/she was harmed by the respondent's failure to make the housing accessible, e.g., had to live at another less convenient or more costly location, was unable to obtain accessible housing.

A complainant who is not actually interested in purchasing, or able to purchase, a unit still may be able to file a complaint against a respondent for the latter's failure to design and construct housing so as to be accessible, as defined by the Act. If the complainant is a tester, his/her complaint may allege that paragraph 804(f)(2) was violated, even though he/she was not a "buyer or renter" as described in 804(f)(1). Paragraph 804(f)(2) makes it unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with a dwelling, because of that person's handicap and/or others' handicaps. 42 U.S.C. § 3604(f)(2). As with paragraph 804(f)(1), discrimination includes the failure to design and construct covered multifamily dwellings so as to meet the Act's accessibility requirements. 42 U.S.C. § 3604(f)(3)(C). However, unlike paragraph 804(f)(1), paragraph 804(f)(2)'s protections are not limited to buyers and renters, but rather extend to all persons.[2]

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[2] Courts specifically have held that testers have standing under subsection 804(b), the language of which parallels that of paragraph 804(f)(2). See United States v. Balistrieri, 981 F.2d 916, 929 (7th C ir. 1992) (finding that logic of Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), that testers have standing under subsection 804(d), extends to subsection 804(b), as each prohibits discrimination against "any person," not just bona fide offerers); Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1527 (7 th Cir. 1990) (holding that Havens logic "embraces discrimination in the provision of services, forbidden explicitly by section 3604(b)"); Wheatley Heights Neighborhood Coalition v. Jenna Resales, 429 F.Supp. 486, 488 (E.D.N.Y. 1977) ("Even if testers cannot properly claim a violation of § 3604(a) because they are not actually seeking to purchase a home, it is clear they can claim that racial steering . . . violates

In sum, complainants against respondents who allegedly failed to design and construct housing so as to meet the Act's accessibility requirements need not be dismissed entirely because the complainant had neither the interest in living nor the financial means actually to live at the housing. Rather, such complaints may be investigated under paragraph 804(f)(2).

Attachment

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the broader language of § 3604(b)"). Since testers may have standing under paragraph 804(b), it follows that they may have standing under paragraph 804(f)(2).

APPENDIX H

Richard F. Armknecht, III
ATTORNEY AT LAW
7862 Danish Downes Court
Salt Lake City, UT 84121
Phone: (801) 942-3804 FAX: (413) 825-8570

June 27, 2001

Mr. Charles E. Hauptman
Director, Office of Fair Housing and Equal Opportunity
Department of Housing and Urban Development
450 Golden Gate Avenue
San Francisco, California 94102-3448

VIA FIRST CLASS MAIL AND FAX: 415-436-6418

Re: DRAC/Smith vs. Diamond Resorts International/Polo Towers, et al.
Complaint No. 09-00-0020-8

Dear Mr. Hauptman:

I have received another "DETERMINATION of NO REASONABLE CAUSE" from your office with regard to another of the administrative complaints submitted by my clients, Disabled Rights Action Committee (DRAC) and Mr. Ronald Ray Smith with regard to design and construction discrimination of Las Vegas area multifamily housing. We have discussed these types of cases repeatedly over the past several months. These discussions may have covered most of what I will present in this letter, but I am writing to you

with the intent of (1) memorializing our discussions and (2) formally requesting a review of the "Determinations of No Reasonable Cause," and the reinstatement of the cases.

The "Determination of No Reasonable Cause" for Complaint No. 09-00-0020-8 states on pages 18-19 that:

> For an individual to have standing, that person has to have suffered a direct and palpable injury. Mr. Smith's purpose for being at the property that is the subject of this complaint was to inspect the complex for possible violation of the design and construction requirements of the Fair Housing Amendments Act. Mr. Smith never alleged that he was qualified to purchase or rent a dwelling at the subject premises, or was in the market to purchase or rent such dwelling. *Furthermore, Mr. Smith's experience as a tester in a design and construction matter is not described as a violation of the law under any provision of the fair Housing Act. Therefore he lacks standing as a tester. Mr. Smith has provided no evidence that he has suffered direct injury and is therefore not an aggrieved person within the meaning of the Act.*

The italicized portion of the paragraph is unclear and (under any possible interpretation) is not consistent with the Fair Housing Act. Please clarify how Mr. Smith lacks standing in this matter. He is disabled and he has been injured (in the form of emotional distress) as a direct result of the discriminatory conditions that you have *verified*.

If you want Mr. Smith to provide information regarding his intangible injuries, he would be glad to provide it (I note that no questions regarding Mr. Smith's injuries were posed by your office in the letter dated April 28, 2001).

If you have determined that intangible injuries are not cognizable under 42 U.S.C. section 3604(f)(2), please provide your basis for such determination. Please include your rationale for distinguishing cases (such as United States v. Balistrieri, 981 F.2d 916 (7th Cir. 1992); and Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898 (2d Cir. 1993)) where testers who were persons of color were awarded in excess of $2,000 for emotional distress associated with encountering discrimination during fair housing enforcement efforts. Of course, the concern among my clients is that a "double standard" is being employed that limits the ability of the disabled to enforce the Fair Housing Act.

If you have some definition of "tester" that limits standing under 42 U.S.C. 3604(f)(2) to persons possessing certain credentials, please provide: (1) a description of the requisite credentials; and (2) the basis for the limitation of the "any person" language of 3604(f)(2) to persons possessing "tester" credentials. Also, is your definition of "tester" applied to enforcement regarding violations of the Fair Housing Act (other than 3604(f)(2)) where the broad "any person" language is used (e.g. 3604(b) or 3604(d))?

Finally, please note that the HUD memorandum (authored by Sara Pratt, Director Office of Investigations and dated February 20, 1997) which you faxed to me on November 8, 1999, states that:

> A complainant who is not actually interested in purchasing or able to purchase, a unit still may be able to file a complaint against a respondent for the latter's failure to design and construct housing so as to be accessible, as defined by the Act. If the complainant was a tester, his/her complaint may allege that

> paragraph 804(f)(2) was violated, even though he/she was not a "buyer or renter" as described in 804(f)(1). Paragraph 804(f)(2) makes it unlawful to discriminate against <u>any person</u> in the terms, conditions, or privileges of sale or rental of a dwelling . . . .
>
> Pratt Memorandum, page 2 (emphasis in original).

Has the Pratt Memorandum been abrogated or superceded? If so, please advise.

It is my hope that, in answering the preceding questions, you will reach the same conclusion that I have with regard to Mr. Smith's standing: his injuries as a tester entitle him to redress under the Fair Housing Act. If you require a statement regarding Mr. Smith's injuries, the statement will be provided. There is simply no reason why a case which has been thoroughly investigated (and where violations of the design and construction requirements of the Fair Housing Act have been verified) should be cast aside where the Fair Housing Act provides a cause of action to a complainant.

Sincerely,

/s/<u>RICHARD F. ARMKNECHT, III</u>
Richard F. Armknecht, III

APPENDIX I

U.S. DEPARTMENT
OF HOUSING AND URBAN DEVELOPMENT
Pacific/Hawaii, California State Office
450 Golden Gate Avenue
San Francisco, California 94102-3448

(Department's SEAL)

July 30, 2001

SUBJECT: DRAC/Smith vs. Diamond Resorts International/Polo Towers, et al.
HUD Complaint No. 09-00-0020-8

Dear Mr. Armknecht:

In your letter dated June 27, 2001, you requested that my office review the "Determination of No Reasonable Cause" issued in the above referenced fair housing complaint on June 20, 2001.

As you point out in your letter, our determination that Mr. Smith provided no evidence that he suffered a direct injury and was therefore not an aggrieved person within the meaning of the Act. This decision was made after close consultation with our legal counsel. As a result of your request I asked our legal counsel to review the concerns you raised in your letter.

Our counsel has completed their review and our original decision of "No Reasonable Cause" remains unchanged.

As always, if you would like to discuss this matter further you can call me at (415) 436-8420.

Sincerely yours,

Original Signed by
Charles E. Hauptman [stamped]

Charles E. Hauptman
Director
Office of Fair Housing and
Equal Opportunity

Supreme Court, U.S.
FILED
AUG 29 200
OFFICE OF THE CLERK

(2)

No. 01-246

IN THE

Supreme Court of the United States

MARK MORTENSON,

Petitioner

v.

ROCK SPRINGS VISTA DEVELOPMENT CORP., INC., A NEVADA CORPORATION; J.A. BLACK CONSTRUCTION, INC., A NEVADA CORPORATION; AND JAMES A. BLACK

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

BRIEF OF RESPONDENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

RICHARD F. ARMKNECHT, III
Counsel of Record for
Disabled Rights Action Committee
7862 SOUTH DANISH DOWNES COURT
SALT LAKE CITY, UTAH 84121
(801) 942-3804

BRIEF OF RESPONDENT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Disabled Rights Action Committee, a Utah nonprofit corporation, respectfully responds to the Petition for a Writ of Certiorari ("Petition") filed by one of its members, Mark Mortenson, to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The Petition was docketed on August 9, 2001 as No. 01-246. Under this Court's Rule 12.6, this Response in Support was due 20 days later, or August 29, 2001.

SUPPORTING REASONS FOR GRANTING THE PETITION

1. The Petition notes *some* of the injury occasioned this Respondent, the Disabled Rights Action Committee ("DRAC"), by the Ninth Circuit's decision (particularly, the deference being shown to the decision by HUD and the consequent dismissal of DRAC's administrative complaints). The injury to DRAC (and, certainly, to other "grassroots" civil rights groups), however, extends beyond the dismissal of housing discrimination complaints filed with HUD.

The limitations on standing occasioned by disregarding "intangible injuries" is not limited to *individual* civil rights plaintiffs. Where a membership civil rights organization (such as DRAC) files suit as a representative of its individual members, it stands in their shoes. Thus, any limitation on the standing of individuals directly impacts civil rights groups. Constrictions on representational standing are made more significant by the circuit courts' ever-narrowing application of the "diversion of resources" rationale available to civil rights groups for establishing standing in their own right. *See, Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). In order to establish standing in their own behalf, civil rights groups must show a diversion of resources from a group's non-litigation efforts. In some circuits, this requirement is

becoming increasingly difficult to meet as civil rights groups' expenditures on investigations for discrimination may not constitute an appropriate diversion of resources to afford organizational standing. *See, e.g., Fair Housing Council v. Montgomery Newspapers*, 141 F.3d 71 (3d Cir. 1998); *Fair Employment Council of Greater Washington v. BMC Marketing Corp.*, 28 F.3d 1268 (D.C. Cir. 1994). Thus, in some circuits, civil rights groups are increasingly reliant upon their members' standing for the enforcement of civil rights laws, including the Fair Housing Act.

Along with the direct damage to DRAC's (and other civil rights groups') ability to establish representational standing, the ability of DRAC to act as a private attorney general is also indirectly diminished by the Ninth Circuit's decision. Because litigation requires attorneys (who generally expect to be paid for their work) and because DRAC's payments to its lawyers are dependant upon its success in litigation, the decisions of the Ninth Circuit and the district court have contributed towards discouraging attorneys from representing DRAC in civil rights enforcement efforts.

2. An additional ground for granting the Petition exists where the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Rule 10(a) of the Rules of the Court.[1]

The record shows that the accepted and usual course of judicial proceedings has not been followed by the courts below as due process of law has (effectively) been denied to Mr.

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[1] *See also, Gibson v. Lockheed Aircraft Service, Inc.*, 350 U.S. 356, 357-358 (1956) (Justice Frankfurter, concurring) (The Court is empowered to grant certiorari to review rulings by courts of appeals "involving ordinary questions . . .which by themselves would never have warranted the granting of a writ [where the rulings] are so obviously and injuriously erroneous as to call for an exercise of this court's power of supervision.").

Mortenson and to this Respondent. While some technical formalities of due process have been accorded in this case, "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

Where courts take filing fees, accept briefs and conduct hearings without actually hearing a plaintiff's case, then the "opportunity to be heard" is flawed. While such failure is difficult to establish, a genuine "opportunity to be heard" is clearly absent: where the district court declares -- *sua sponte* – a new interpretation of law[2]; where the district court ignores allegations made in the First Amended Complaint in Intervention, and completely misstates what the plaintiff's counsel said at oral argument (Appendix J, *infra,* 49a-51a); where the district court dismisses under Fed.R.Civ.Pro. 12(b)(6) without giving leave to amend;[3] where oral argument before the Court of Appeals would lead any informed observer to conclude that the civil rights litigant's appeal would be successful (Appendix K, *infra*, 56a (comments of Judge Hug regarding statutory scheme) and 58(a) (comments of Judge Hug regarding intangible injuries)); and where the decision of

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[2] In this case, that physical "conditions" do not constitute "conditions" for the purpose of 42 U.S.C. § 3604(f)(2).

[3] And where the Court of Appeals faults the plaintiff for having "failed to move to amend" despite that court's precedent "that in dismissals for failure to state a claim, a district court should grant leave to amend *even if no request to amend the pleading was made*, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss & Liehe v. N.C. Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990)(emphasis added). Judge Noonan, apparently believing that Mr. Mortenson was entitled to amend a *second* time (and *after* the entry of judgment without leave to amend) scolded Mortenson's counsel for not having given Judge Rawlinson (who at the time of oral argument was a judge of the Ninth Circuit) "a chance" and cast doubt on the likelihood of Mr. Mortenson getting "a chance" from the Ninth Circuit. Appendix K, *infra*, 55a.

the Court of Appeals is relegated to an unpublished opinion which may not be cited as precedent to the Court of Appeals.

CONCLUSION

The facts (which, in the context of a motion to dismiss, are the allegations of the complaint)and the law in this case are clear enough to warrant summary reversal of the decision at issue.

Alternative to summary reversal, this Court's precedents suggest a course of action that the Court has noted "can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit [this Court's] plenary review." *Lawrence v. Chater*, 516 U.S. 163, 168 (1996). That course of action is a "GVR order" where the Court grants certiorari, vacates the judgment below, and remands the case so that the Court of Appeals may decide it in light of an intervening event, such as a postjudgment decision of this Court. The intervening event in this case is this Court's recent decision in *United States v. Mead Corp.*, 533 U.S. __, 121 S.Ct. 2164 (2001) which noted that "*Chevron* did nothing to eliminate *Skidmore's* holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and *given the value of uniformity in its administrative and judicial understandings of what a national law requires.*" *Id.* at 2175, *quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944) (emphasis added).[4]

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[4] The Ninth Circuit did not address the persuasiveness of the *HUD Memorandum of February 20, 1997, issued by Sara Pratt, Director, Office of Investigations (Subject: Standing in Accessibility Cases in Light of Ricks v. Beta Development Co., 1996 U.S. App. LEXIS 19743 (9th Cir. Aug. 1, 1996)*, (Petition, Appendix G, 38a-41a). Also, two reported decisions of

In a case where the Court of Appeals has chosen to ignore the national policy of HUD regarding the enforcement of the Fair Housing Act in an *unreported decision*[5] that sustains the holding of a judge currently sitting on that Court of Appeals, and which, as noted, *supra*, effectively denies plaintiffs an opportunity to be heard, the benefits of a GVR order, as recognized in *Lawrence v. Chater*, are clear.

Respectfully submitted.

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the Ninth Circuit (*Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999) and *Holley v. Meyer*, 2001 WL 856093 (9th Cir., July 31, 2001)) that were *authored* by the senior member of the panel that heard the case at issue clearly recognize the significance of HUD's interpretations of the FHA. Accordingly, the Ninth Circuit's failure to even address the HUD Memorandum can only be explained by its not being entitled to *Chevron* deference.

[5] This case does not involve the constitutionality of court rules (e.g. Ninth Cir. Rule 36-3) that prohibit citation to unpublished opinions as precedent, a topic which has engendered substantial scholarly comment since 1999 (and especially after the decision of the Eighth Circuit in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), vacated en banc as moot, 235 F.3d 1054 (8th Cir. 2000)). It is clear enough, however, that a court's *de facto* ability (whether constitutional or not) to disregard its own decisions for the purposes of precedent weighs in favor of review of granting the Petition: "Nonpublication must not be a convenient means to avoid review." *Smith v. United States*, 502 U.S. 1017, 1020 n. (1991) (Justice Blackmun, dissenting).

APPENDIX J

CASE NO.: 99-16754

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff,

ALAN J. NOLD; AURORA NOLD;
Plaintiff-Intervenors, and

MARK MORTENSON
and DISABLED RIGHTS ACTION COMMITTEE,
a Utah nonprofit corporation,
Plaintiff-Intervenors-Appellants

v.

ROCK SPRINGS VISTA DEVELOPMENT CORP., INC.; et. al.,
Defendants - Third-party Plaintiffs - Appellees, and

THE KEITH COMPANY; VTN
Third-party Defendants - Appellees.

CASE NO.: 99-16754
(An Appeal from the U.S. District Court for the District of Nevada)

BRIEF OF APPELLANT

* * * *

ARGUMENT

* * * *

D. The Court Ignored the Record Before It to Deny Mortenson's Standing Under 42 U.S.C. § 3604(f)(1)

The District Court's Order contains several declarations regarding Appellants' injury under § 3604(f)(1) which were clearly contrary to the statements of Appellants' counsel at the hearing. Such declarations were (1) that Appellants had "failed to allege that [they] were prospective buyers, or that but for the architectural barriers in the condominium, they would have purchased a unit," ER 20, and (2) that Appellants had "failed to allege that [they] had sufficient financial means to purchase a condominium." ER 21. Similarly, a declaration was made regarding causation: "[Appellants] do not allege that units at RSV #7 would satisfy their housing needs or that [they] have the means to purchase a unit at RSV #7." ER 22.

As was repeatedly stated by Appellants' counsel at the hearing, however, Mr. Mortenson was a prospective buyer of a condominium at RSV #7. First, at Pages 11-12 of the Transcript:

> THE COURT: Mr. Armknecht, though, is Mr. Mortenson alleging that he was a prospective buyer?
> MR. ARMKNECHT: Yes, Your Honor.
> THE COURT: Is - - where is that in the complaint?
> MR. ARMKNECHT: Okay. Sorry I didn't highlight it.
> THE COURT: Are you looking at the amended complaint or the original?
> MR. ARMKNECHT: Amended, Your Honor. Ah, top of page 4, paragraph 7, Your Honor. That Rock Springs Vista Number VII, the

condominium development visited by Mortenson during his search for suitable housing during 1995. If using the term "prospective buyer" is a key word, I admit it's not there, but that is what he was doing.
THE COURT: All right.

ER 13-14 (emphasis added).

Second, at Page 13 of the Transcript:

THE COURT : And Mr. Sheffer -- where was Mr. Sheffer living at that time?
MR. ARMKNECHT: He was living in Las Vegas, Your Honor.
THE COURT: Okay. And he -- and you're saying that he was a prospective buyer?
MR. ARMKNECHT: Yes, Your Honor. I have a statement to -- by a real estate agent who was working with him at the time to that effect as well.
THE COURT: And he was looking to buy as opposed to rent?
MR. ARMKNECHT: Both of them were looking to buy, Your Honor.

ER 15 (emphasis added).

Third, at Page 23 of the Transcript:

THE COURT: And what do you base the -- your view on that the occurrence is when it opens?
MR. ARMKNECHT: The occurrence of discrimination is when it -- but the -- actually the occurrence of the discrimination -- of the -- of the cause of action was when they came looking for housing and they found it to be inaccessible. That was -- that was when they

> became aggrieved person. That was when they were injured. It couldn't be before then.
> THE COURT. On that point, are you saying that the individual plaintiff interveners were ready, willing, and able buyers at that point?
> MR. ARMKNECHT. Yes, Your Honor.

ER 16 (emphasis added).

Despite the above-quoted statements made by Appellants' counsel at the hearing, the District Court's Order declares that "At the hearing, Plaintiffs also gave no indication that they would be able to allege sufficient facts so as to provide standing." ER 24. Such finding of fact is clearly erroneous and the decision of the District Court should accordingly be reversed and the case remanded for further proceedings.

E. The Court Should Have Allowed Appellants the Opportunity to Amend

Where a fair housing complaint's "extreme generality" makes it "impossible to say that [plaintiffs] have made factual averments sufficient if true to demonstrate injury in fact . . . the District Court should afford the plaintiffs an opportunity to make more definite the allegations of the complaint." Havens Realty Corp. v. Coleman, 455 U.S. 363, 378 (1982).

The Ninth Circuit has held "that in dismissals for failure to state a claim, a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." Cook, Perkiss & Liehe v. N.C. Collection Serv., 911 F.2d 242 (9th Cir. 1990). Any deficiency in the First Amended Complaint in Intervention could have been cured by the allegation of additional facts regarding intent to buy a condominium and the financial ability to buy one. Despite the clear indications given at the hearing of the motion to dismiss, ER 13-16, the District Court did not grant

leave to amend. Such failure should be addressed by this Court: the District Court's dismissal should be reversed and the case should be remanded for further proceedings.

* * * *

Respectfully Submitted this 19th day of May, 2001.

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APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF
AND
MARK MORTENSON; DISABLED RIGHTS ACTION COMMITTEE, A
UTAH NON-PROFIT CORPORATION
PLAINTIFFS-INTERVENORS-APPELLANTS
v.
ROCK SPRINGS SPRINGS VISTA DEVELOPMENT; J.A. BLACK
CONSTRUCTION CO.; JAMES BLACK
DEFENDANTS-THIRD PARTY PLAINTIFFS-APPELLEES
AND
AURORA NOLD,
DEFENDANT-APPELLEE
THE KEITH COMPANY; VTN
THIRD-PARTY-DEFENDANTS-APPELLEES

No. 99-16754.
D.C. No. CV-01825-JBR (RLH)

Argued and Submitted Feb. 14, 2001.
Decided May 8, 2001.

Appeal from the United States District Court
for the District of Nevada
Johnnie B. Rawlinson, District Judge, Presiding.

Before HUG, NOONAN, and W. FLETCHER, Circuit Judges.

EXCERPTS OF ORAL ARGUMENT*

* These excerpts were transcribed from a tape recording of the proceedings by the respondent. No official transcripts of oral arguments are provided by the Ninth Circuit.

* * *

JUDGE FLETCHER: Run me, run me through procedurally what happened. That is to say, there was a motion for summary judgment or a motion to dismiss?

Mr. Armknecht: A motion to dismiss, your honor.

JUDGE FLETCHER: Under 12(b)(6)?

Mr. Armknecht: There was never a motion. . . Yes, your honor, 12(b)(6).

JUDGE FLETCHER: And then what happened?

Mr. Armknecht: Then there was a hearing at which I clarified to the district court what was going on and the district court promptly issued a dismissal.

JUDGE FLETCHER: A dismissal?

Mr. Armknecht: Dismissal.

JUDGE FLETCHER: A dismissal, now dismissal pursuant . . . under 12(b)(6) . . .

Mr. Armknecht: Yes, your honor.

JUDGE FLETCHER: . . . or dismissal under summary judgment?

Armknecht: Dismissal under 12(b)(6), your honor.

JUDGE NOONAN: Did you then move to amend?

Mr. Armknecht: Ah, no, your honor, I . . . the Court clearly wasn't looking at the representations that we were making in . . . at oral argument. Ah, and . . .

JUDGE NOONAN: So you never made that motion to amend the second time?

Mr. Armknecht: No, your honor.

JUDGE NOONAN: Well, how come you didn't give the judge a chance to rule on it and then come up and ask us to give a . . . you a chance?

* * *

JUDGE HUG: I have to stop you there for a moment.

Mr. Ferrario: Yes, sir.

JUDGE HUG: What is the relationship of (f)(3) to (f)(2)?

Mr. Ferrario: (f)(3) is a delineation of what can be discrimination. Under (f)(3), we have in (f)(3)(C) – it is what he's bringing suit under -- is a failure to construct in an accessible fashion for lack of a better word. And that can be discrimination. No question. I mean, Congress has said that under (f)(3). But we have to go back and try to make sense out of this and what we try to do here is go back to the legislative history. Congress said that "section 3604(f)(2) would prohibit discrimination against the same persons (and there its referencing (f)(1)) in the terms, conditions or privileges or provision of services or facilities. This provision is intended to prohibit special restrictive covenants or other

terms and conditions or denials of service because of an individual's handicap which would have the effect of excluding congregate living arrangements, access to recreational facilities . . .

JUDGE HUG: Why do we have to go back to the legislative history? The statute seems pretty clear, doesn't it? You say "make sense out of it." I'm not really having much trouble making sense out of this statute.

* * *

JUDGE FLETCHER: Let's keep away from the "moving target." We're now talking with an amended complaint, we're talking about (f)(2), so let's just talk about (f)(2).

Mr. Ferrario: I . . . I'll do that because I'm going to go to the brief that was filed by Mr. Armknecht and when he describes the injuries involved in this case, he talks about "intangible injuries." "Intangible injuries" and when you read the cases dealing with standing and they talk about concrete and palpable injuries, I'm having a difficult time seeing how the injury, the intangible injury supposedly suffered by his client comport with the pronouncements of the Supreme Court and the circuit courts in regard to standing. And that's the point I wanted to make there. Um, that, and this is right out of his brief at page 5 when he describes his amended complaint that we're dealing here with "intangible injuries": page 5, under the description of events section. Um, and I don't think that section (f)(1) or section (f)(2) even if you read them broadly as some . . . as the Supreme Court cases would lend you to do . . . um, in terms of standing provide redress for simply "intangible injuries."

JUDGE NOONAN: As I understood Judge Posner's opinion, he said well, Congress can create standing and, uh, has done

it for testers. Because, obviously, the tester is not suffering any immediate economic harm personally, and so Congress has created for the tester a standing.

Mr. Ferrario: In the tester cases what you typically have if you go through the cases where tester standing has been allowed is a situation where its necessary to uncover a violation to have someone to pose as a buyer or renter to go in and ferret out discrimination . ..

JUDGE NOONAN: Well, supposing Mortenson is a tester. Why, why doesn't he qualify?

Mr. Ferrario: There is no reason here to employ tester liability. The discrimination he is talking about has nothing to do with any sort of affirmative representation that may or may not be made by the seller of the condominium. The steps in front of the condominium, if they bar accessibility are there, they're objective. There's no reason to employ a tester standing . . .

JUDGE NOONAN: Well, it's not a misrepresentation, but it is a discovery that this place doesn't have access.

Mr. Ferrario: But any person who is seeking housing in that context, be they of African-American descent, Mexican-American descent, handicapped or otherwise will be treated the same when they approach that step. There's no reason in this context to employ tester liability. You would be making an expansion -- or tester, excuse me, standing – you would be making an expansion of that doctrine beyond what I think it was intended to do if you look at the cases dealing with that. We're talking here about objective things. We're talking about construction of a dwelling and also if look at the Complaint and I was trying to do that today as I heard Mr. Armknecht articulate that now Mr. Mortenson is a tester

under (f)(2). I don't believe that they've alleged that in the Complaint. And I . . . I think again, we have to come back an try to make some sense out of this statutory scheme. And, I admit it's a difficult task.

JUDGE HUG: Let me . . . I don't know that its so difficult. I . . . it seems pretty clear. You say that, that "intangible damages" are not appropriate. What else could there be other than intangible damages? You haven't hurt the person. You haven't . . . there's been no physical damage. They're all intangible damages when there's a violation here.

* * *

SUPREME COURT, U.S.
FILED
OCT 9 2001
OFFICE OF THE CLERK

No. 01-246

IN THE

Supreme Court of the United States

MARK MORTENSON,

Petitioner,

v.

ROCK SPRINGS VISTA DEVELOPMENT CORP., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. May an injury related to discriminatory *structural* conditions (as described in subparagraph 804(f)(3)(C) of the Fair Housing Act (codified at 42 U.S.C. § 3604(f)(2)(C)) constitute an "injury in fact" for the purpose of establishing standing under 42 U.S.C. § 3604(f)(2)?

2. Do *intangible* injuries to a plaintiff who seeks monetary relief for discrimination in violation of paragraph 804(f)(2) of the Fair Housing Act (codified at 42 U.S.C. § 3604(f)(2)), constitute "distinct and palpable" injuries for the purposes of establishing standing under Article III of the U.S. Constitution?

3. Whether the Ninth Circuit Court of Appeals properly decided the issue of standing.

4. Whether this case presents a basis for this Court to exercise its certiorari power.

STATEMENT PURSUANT TO RULE 29.6

Respondents have no parent corporations and no publicly held company owns 10% or more of the stock of any of the Respondents.

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STATEMENT OF THE CASE

Respondents offer the following as a correct account of the facts in this case.

A. Background to Mortenson's Claim

This case originated when the United States filed a complaint against Rock Springs Vista Development Corporation, J.A. Black Construction, Inc. and James A. Black (hereinafter collectively referred to as "J.A. Black") under 42 U.S.C.A. § 3614 alleging a pattern of discrimination relating to the design and construction of five condominium developments (the Rock Springs Vista Developments). Petitioner Mortenson is a wheelchair user who filed a Complaint in Intervention claiming damages for discrimination as a result of an alleged visit to a Rock Springs Vista Development. The *sole* allegation in Mortenson's First Amended Complaint in Intervention regarding his involvement with the development states: "... ROCK SPRINGS VISTA DEVELOPMENT CORPORATION is the builder of ... the condominium development visited by MORTENSON during his search for suitable housing during 1995." Mortenson has not alleged any connection to or interest in the condominium other than his single alleged visit. Although Mortenson has claimed to have been conducting a housing search at the time of his alleged visit, there is no evidence in the record below indicating that he ever purchased or otherwise acquired any housing in Las Vegas. The First Amended Complaint filed by Mortenson does not contain any allegation that he was ever legitimately interested in purchasing a condominium in Las Vegas, nor does it allege that Mortenson would have the means to purchase a condominium in Las Vegas.

B. The Decision of the Courts Below

On June 28, 1999, Respondents filed their Motion to Dismiss Plaintiff's [Petitioner's] First Amended Complaint in Intervention and, on June 30, 1999, a hearing was held on the Motion. On July 2, 1999, the district court entered its Order holding that the alleged discriminatory structural conditions encountered by Mortenson did not constitute "terms, conditions, or privileges that discriminate against Mortenson" and that, accordingly, Petitioner had "not alleged a particularized injury." Furthermore, the district court held that Mortenson had "not alleged claims that are redressable."

After a timely appeal to the United States Court of Appeals for the Ninth Circuit, briefing, and oral argument on February 14, 2001, the circuit court of appeals entered its Memorandum Opinion on May 8, 2001, affirming the decision of the district court. The Ninth Circuit held that: (1) Mortenson's allegations of "nominal" damages for intangible injuries were insufficient to constitute "actual" damages under the Fair Housing Act; and (2) Mortenson's injuries related to encountering inaccessible structural conditions at Rock Springs Vista did not constitute cognizable injuries under 42 U.S.C. § 3604(f)(2). Mortenson subsequently moved for rehearing, which motion was denied on July 5, 2001. (Petitioner's Appendix C).

REASONS FOR DENYING THE WRIT

A. The Ninth Circuit Correctly Ruled that Mortenson Lacked Standing to Bring a Claim under 42 U.S.C. § 3604(f)(2) in Accordance with This Court's Prior Decisions.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), this Court codified the "irreducible constitutional minimum of standing" as: (1) injury in fact; (2) causation; and (3) redressability. An injury in fact is an "invasion of a legally protected interest which is: (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Id.* Thus, Petitioner Mortenson was required to allege a concrete injury, traceable to Respondents' actions that was redressable by a favorable decision. Petitioner claims injury under §§ 3604(f)(1) and 3604(f)(2). Petitioner contends that the Ninth Circuit erred as to its decision regarding Petitioner's standing under subsection 3604(f)(2). As the Ninth Circuit correctly held, Petitioner does not have standing under either section.

1. *The Court must interpret § 3604(f)(2) in harmony with § 3604(f)(1).* It is a basic principle of statutory construction that one section of a statute must not be interpreted in such a manner as to render another section meaningless. *See United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 550 (1996) ("the more natural reading of the statute's text, which would given effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight"); *United States v. Menasche*, 348 U.S. 528, 538 (1955) ("the more natural principal of statutory construction is to save and not destroy"); *United States v. Fiorillo*, 186 F.3d 1136, 1153 (9th Cir. 1999); *In re Jackson*, 184 F.3d 1046, 1052 (9th Cir.

1999). Section 3064(f)(1) by its plain language is limited to persons who are buyers or renters of property. Any interpretation of § 3604(f)(2) must preserve that limitation. Petitioner, however, encourages this Court to find that § 3604(f)(2) be interpreted to mean that any person has standing under that subsection regardless of their status and regardless of their claimed injury. Such an interpretation would essentially eliminate § 3604(f)(1).

2. *The legislative history of § 3604(f)(2) demonstrates that Congress did not intend this section to be interpreted as broadly as Petitioner urges.* Congress adopted the Fair Housing Amendments Act (FHAA) in 1988. In conjunction with the passage of the Act, the House of Representatives issued a Report which reviewed the new material incorporated into the Fair Housing Act. H.R. Rep. 100-711. That report specifically addressed the intended scope of § 3604(f)(2) as follows:

> New subsection [3604](f)(2) would similarly prohibit discrimination against the same persons in the terms, conditions, privileges, or provision of services or facilities. This provision is intended to prohibit special restrictive covenants or other terms or conditions, or denials of service because of an individual's handicap and which have the effect of excluding, for example, congregate living arrangement for persons with handicaps. It would guarantee, for example, that an individual could not be discriminatorily barred from access to recreation facilities, use of premises, benefits and privileges made available to other tenants, residents and owners.

H.R. Rep. 100-711, 100th Congress, 2d Sess., 1988 WL 169781 (1988).

With this explanation of legislative intent as a backdrop, it is clear how these two statutory provisions should be read together. Subsection (f)(1) prohibits discrimination which amounts to an outright refusal to sell or rent to persons with disabilities. Such discrimination by its very nature would tend to be open and obvious. Therefore, since such discrimination can be readily detected, there is no need to grant a private cause of action to enforce this statute to a broad class of plaintiffs.

Subsection (f)(2), however, covers discrimination where there is not an outright refusal to sell or rent to persons with disabilities. Such kinds of discrimination are generally only uncovered by an investigation involving sending different people in to gather information from a housing provider. Thus, this Court has held that "testers" who are not legitimately interested in acquiring housing may have standing in cases involving discriminatory housing pricing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). However, in a case involving claims of improper design and construction, the discrimination would tend to be open and obvious. Accessibility barriers are generally objective, readily observable conditions, such as steps on sidewalks. Therefore, because this type of discrimination is not hidden, as in racial discrimination cases, there is no need for testers in order to determine whether such discrimination is occurring. Either the structure is handicap accessible or it is not. There is no reason to assume that Congress intended § 3604(f)(2) to confer tester standing in handicap discrimination cases involving open and obvious design and construction issues. Indeed because this kind of discrimination is open and obvious there is nothing to test. Sending a minority member posing as an applicant to a housing complex suspected of racial discrimination "tests" that hypothesis. In such a case,

the discrimination does not occur until the tester goes on site. When dealing with accessability barriers however the discrimination is present once construction is complete. No one can "test" whether a step exists in a sidewalk. The step is either there or it isn't. If the step is there, then people actually injured by the step can bring a claim. Absent such an actual injury however, there is no standing.

3. *The Ninth Circuit's decision in this case is not in conflict with the Department of Housing and Urban Development's policy.* Petitioner, in his Brief, cites to a Memorandum prepared within the Department of Housing and Urban Development and argues that the Ninth Circuit's decision in this case is contrary to this Memorandum. Further, Mortenson contends that the HUD Memorandum supports his claim that any person would have standing under § 3604(f)(2), regardless of the claimed injury. However, such contention grossly oversimplifies and overstates the meaning of the Memorandum in question.

Petitioner merely cites the Memorandum as standing for the proposition that "the national policy of the U.S. Department of Housing and Urban Development (HUD) is to treat design and construction discrimination as actionable under 42 U.S.C. § 3604(f)(2)" without any further discussion of the contents of the Memorandum. (Mortenson's Petition for Certiorari at 7). However, the HUD Memorandum explicitly states: "A complainant who is not actually interested in purchasing or able to purchase a unit still *may* be able to file a complaint against a respondent . . . *if* the complainant is a tester his/her complaint may alleged that paragraph 804(f)(2) was violated. . . ." (Petitioner's Appendix G) (emphasis added). First, this Court should note that the terms of the Memorandum are equivocal.

It does not indicate that persons who are not buyers or renters have standing under § 804(f)(2) (codified at 42 U.S.C. § 3604(f)(2)). Rather, the Memorandum indicates that standing under subsection (f)(2) is a possibility. Moreover, the Memorandum itself limits its application to "testers." As discussed above, "Tester Standing" is inapplicable to a case such as this involving allegations of discriminatory construction which are open and obvious. Thus, the decision of the Ninth Circuit in this case does not conflict with HUD's Memorandum. Rather, the Memorandum actually supports the Ninth Circuit's holding that the Petitioner does not having standing under § 3604(f)(2).

4. *A claim under § 3604(f)(2) must still meet Constitutional standing requirements.* Section 3604(f)(2) does apply to "any person." However, even under the broad standing conveyed when the term "any person" is used, a claim must still meet the minimum requirements of Article III. *See, e.g., Lujan, supra.* In *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), this Court acknowledged that while standing under the FHA was broad, a plaintiff must have "suffered 'a distinct and palpable injury to himself,' . . . that is likely to be redressed if the requested relief is granted," *id.* at 100 (citations omitted) and recognized that this requirement was a Constitutional limitation on standing. The *Gladstone* case involved racial discrimination in the form of "steering" in a particular neighborhood. The Court found that those plaintiffs who alleged injury to the neighborhood in which they lived had standing while plaintiffs who did not reside in the neighborhood at issue lacked standing to sue. Therefore, this Court must analyze this standing issue by referring to Mortenson's claimed injuries.

The only discrimination Petitioner claims stems from the design and construction of the Rock Springs Vista development. This type of discrimination primarily serves to impact residents or those with close ties to residents. As this Court noted in *Havens*, "[w]e have not suggested that discrimination within a single housing complex might give rise to 'distinct and palpable injury' . . . throughout a metropolitan area." *Havens*, *supra* at 377 (citation omitted). This Court determined that some type of interest in the subject neighborhood was required to meet the constitutional threshold for standing. However, Petitioner here makes only the general claim that the alleged discrimination within the Rock Springs Vista development somehow caused him injury. Petitioner has not alleged any particular interest in the development.

As the Ninth Circuit correctly determined, Mortenson has not alleged a distinct and palpable injury fairly traceable to Respondents. He claims that his injury stemmed from being denied "the full range of housing opportunities . . . , the opportunity to live in an integrated area . . . , and frustration, mental anguish, humiliation, and embarassment. . . ." (Petitioner's Appendix E, p. 27a). Petitioner does not allege that he was denied a specific housing opportunity that he wished to pursue, nor does he allege that any act of Respondents led to a secondary injury of the type referred to in *Gladstone*. Instead, he alleges only the type of generalized injury that was rejected by this Court in *Havens*. Thus, contrary to the assertions of the Petitioner here, the Ninth Circuit's decision is clearly in line with this Court's prior holdings.

B. The Ninth Circuit's Decision is Not in Conflict with Decisions of other Circuit Courts of Appeal.

Petitioner argues that this Court should grant his Petition for Certiorari because the Ninth Circuit's decision in this case is in conflict with the holdings of at least four other circuit courts.[1] However, these cases are easily factually and legally distinguishable from the case at bar. For example, Petitioner cites *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 907 (2d Cir. 1993), in which the Second Circuit found that African-American newspaper readers who saw advertisements depicting only white models in ads for residential apartments had standing to maintain an action under 42 U.S.C. § 3604(c), even if they were not in the market for housing when they viewed the ads. Petitioner cites this case as standing for the proposition that he did not have to allege an interest in the property to have standing to sue. However, *Ragin* involved an entirely different subsection of the Fair Housing Act, § 3604(c), which deals with racially discriminatory advertising.[2]

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1. Petitioner cites five such cases specifically: *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 907 (2d Cir. 1993), *Tyus v. Urban Search Management*, 102 F.3d 256, 265 (7th Cir. 1996) (suit against owner of upscale apartment complex and his wife for their alleged racially discriminatory advertisements), *United States v. Balistrieri*, 981 F.2d 916, 926 (7th Cir. 1992), *Morgan v. Secretary of Housing and Urban Dev.*, 985 F.2d 1451 (10th Cir. 1993) (familial status case in which the court found that "more than mere assertions of emotional distress are required"), and *Banai v. Secretary, U.S. Dept. of Housing*, 102 F.3d 1203, 1207 (11th Cir. 1997) (racial discrimination case).

2. Subsection 3604(c) prohibits discrimination in housing advertisements on the basis of race, color, religion, sex, handicap, familial, or national origin.

There is a fundamental difference between the discrimination proscribed by subsection 3604(c) and the type alleged by Petitioner here. Advertising, by its very nature, reaches beyond the bounds of a particular housing community. Therefore, it is possible for such advertising to impact someone with no connection to the community. However, in order for a community's design and construction to impact someone, they must have a direct connection to that community. The record makes it abundantly clear that Petitioner has demonstrated no such link. Therefore, Petitioner is attempting to make an analogy that doesn't work. Subsection 3604(c) does not limit or qualify a claim as does subsection 3604(f)(1), which requires a plaintiff to have some interest in the property as a buyer or renter.

Petitioner also cites the *Balistrieri* case out of the Seventh Circuit as being in conflict with the Ninth Circuit. Again, this case involved racial discrimination and "testers." Further, the court in *Balistrieri* held that a plaintiff must actually prove that he suffers from emotional distress and the alleged discrimination caused that distress and not resort to mere conclusory statements. The Ninth Circuit here found no evidence of injury in fact nor has Petitioner alleged any concrete injury apart from the alleged violation of 42 U.S.C. § 3604(f)(2). Moreover, as previously discussed, Petitioner is not a "tester". Therefore, none of the cases from other circuits cited by Petitioner even indirectly conflict with the decision of the Ninth Circuit in this matter.

CONCLUSION

The Ninth Circuit's decision in this case was correct. The HUD Memorandum, this Court's prior holdings, and the decisions from other circuits cited by Petitioner do not support Mortenson's claim of standing under 42 U.S.C. § 3604(f)(2). Petitioner has failed to allege a concrete and palpable injury traceable to Respondents' actions. Mortenson had no interest in the property nor has he ever claimed to be a tester in this case. Thus, Petitioner lacks the requisite constitutional standing and accordingly, his Petition for Certiorari should be denied.

Respectfully submitted,

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No. 01-246

IN THE

Supreme Court of the United States

MARK MORTENSON,
Petitioner

v.

ROCK SPRINGS VISTA DEVELOPMENT CORP., INC.,
A NEVADA CORPORATION;
J.A. BLACK CONSTRUCTION, INC., A NEVADA CORPORATION;
AND JAMES A. BLACK,
Respondents

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioner, Mark Mortenson, hereby replies to the Brief in Opposition filed by Respondents, Rock Springs Vista Development Corp., *et al.*, ("Respondent") in this case with the following points of analysis.[1]

1. Regarding Respondent's Account of the Facts.

This Court has held that, where a fair housing complaint's "extreme generality" makes it "impossible to say that [plaintiffs] have made factual averments sufficient if true to demonstrate injury in fact . . . the District Court should afford the plaintiffs an opportunity to make more definite the allegations of the complaint." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982).

The Ninth Circuit instructs district courts, when dismissing a case for failure to state a claim, to:

> grant leave to amend even if no request to amend the pleading was made, unless [the district court] determines that the pleading could not possibly be cured by the allegation of other facts.

Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000) (en Banc decision), *quoting Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995). *See also, Cook, Perkiss & Liehe v. N.C. Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990) (same quotation).

Respondent, however, repeatedly overlooks the fact that this case was dismissed under Rule 12(b)(6) of the

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[1] To the extent that Respondent addresses Petitioner's claim under 42 U.S.C. § 3604(f)(1), Petitioner will not reply – except to note that the Petition for Writ of Certiorari only seeks review of matters related to the claim under 42 U.S.C. § 3604(f)(2).

Federal Rules of Civil Procedure *without leave to amend*. Thus, where Respondent argues that the "proof" of a violation (or, of an injury) is insufficient, that argument simply has no place in discussion of the early stage of proceedings at which the case presented for review was dismissed.

The proper questions before the Ninth Circuit (and, now, before this Court) concern matters of *law* and not *fact*. Arguments tending to focus this Court's attention on matters of *fact* (which arguments would be appropriate in the review of a dismissal on summary judgment) instead of the relevant matters of *law* can only serve to obfuscate the allegations of the First Amended Complaint in Intervention.[2]

2. Regarding Application of 42 U.S.C. § 3604(f)(2) to Design and Construction Violations.

The statutory scheme at issue is plain enough, but Respondent suggests that 42 U.S.C. § 3604(f)(1) would be rendered redundant if 42 U.S.C. § 3604(f)(2) is applied according to its plain terms. A similar argument would be that 42 U.S.C. § 3604(a) is rendered redundant if 42 U.S.C. § 3604(b) is applied according to its plain terms. Either

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[2] Respondent (apparently confident that this Court will choose to review dismissal under Rule 12(b)(6) motion as though it were a dismissal on a motion for summary judgment) effectively concedes the plain meaning of the allegations of the First Amended Complaint in Intervention. For example, Respondent states that "Mortenson has not alleged any connection to or interest in the condominium other than his single alleged visit . . . Mortenson has claimed to have been conducting a housing search at the time of his alleged visit, ...", (Brief in Opposition, p. 1), Respondent thus essentially *concedes* that Mortenson's First Amended Complaint in Intervention (Appendix E) alleges that Mortenson was at the site of the alleged intangible injuries. Also, Respondent effectively concedes allegation of injury: "Petitioner [has not] alleged any concrete injury *apart from* the alleged violation of 42 U.S.C. § 3604(f)(2)." (Brief in Opposition, p. 10) (emphasis added).

argument ignores the fact that, in each of these "couplets" of prohibitions on discrimination, one is aimed at discrimination that will "make unavailable or deny" a dwelling and the other is aimed at discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwelling."

If design and construction discrimination can only fit into one of those categories, then it certainly must be the latter: design and construction discrimination includes physical conditions (*e.g.*, a failure to place "light switches, electrical outlets, thermostats, and other environmental controls in accessible locations" 42 U.S.C. § 3604(f)(3)(C)(iii)(III)) that might not be construed as "denying" a dwelling to a disabled person, but that certainly present "conditions" that diminish the usefulness of the dwelling to a disabled person.

3. Regarding "Distinct and Palpable" Injuries.

Recognizing that Mortenson has "claimed injuries" related to "the design and construction of the Rock Springs Vista Development" (Brief in Opposition, pp. 7-8), Respondent attempts to characterize Mortenson's personal injuries (which are in the form of emotional distress) as insufficient to constitute a "distinct and palpable injury" (Brief in Opposition, p. 8) for the purpose of meeting the minimum requirements of Article III. Respondent contends that, because Mortenson "does not allege a specific housing opportunity that he wished to pursue" (Brief in Opposition, p. 8), his injury is not "distinct and palpable" but is, instead, merely "generalized."[3]

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[3] If Respondent's conclusions were applied to *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) and to *United States v. Balistrieri*, 981 F.2d 916 (7th Cir. 1992), the "testers" in those cases would not have had standing. Of course, it is the inability to allege an interest in a particular housing opportunity that gives rise to the term of art – "tester" -- that this Court has used in the past. Respondent has quoted the *Havens* decision

The point that Respondent seems to miss in this regard is that the requisite "specificity" of the injury relates to the person alleging injury, not whether the violation at issue is found at only one "specific" dwelling. *See, Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000) ("The relevant showing for Article III standing, however, is not injury to the environment but injury to the plaintiff.").

4. Regarding the "HUD Memorandum."

Respondent attempts to neutralize the effect of the *HUD Memorandum of February 20, 1997, issued by Sara Pratt, Director, Office of Investigations (Subject: Standing in Accessibility Cases in Light of Ricks v. Beta Development Co., 1996 U.S. App. LEXIS 19743 (9th Cir. Aug. 1, 1996)* (Appendix G, "HUD Memorandum").

Respondent asserts that the HUD Memorandum is "equivocal" (and, presumably, that the case at issue does not therefore present a departure from HUD's nationwide enforcement policies) because the HUD Memorandum uses the word "may." Some context is useful in this regard. The HUD Memorandum, as is clear from its very heading, deals with the

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out of context. This case has *never* concerned "neighborhood" standing, but Havens' discussion of the limitations of that concept is the source of Respondent's quotation (at page 8 of the Brief in Opposition) of *Havens*. This Court, however, understands that the:

> concept of 'neighborhood' standing differs from that of 'tester' standing in that the injury asserted is an indirect one: an adverse impact on the neighborhood in which the plaintiff resides resulting from the steering of persons other than the plaintiff. By contrast, the injury underlying 'tester' standing – the denial of the tester's own statutory right to truthful information -- is a direct one." *Havens*, 455 U.S. at 375.

effects of an unreported Ninth Circuit decision (much like the case at issue in the Petition) on the enforcement of the design and construction provisions of the Fair Housing Act. That case, *Ricks v. Beta Development Co.*, held that a disabled person must allege a genuine interest in buying a condominium if he is to have standing under 42 U.S.C. § 3604(f)(1) and the HUD Memorandum was aimed at showing HUD's enforcement offices that the effect of *Ricks v. Beta Development Co.* was limited to 42 U.S.C. § 3604(f)(1) – claims under 42 U.S.C. § 3604(f)(2) could proceed under the broader standing afforded by the "any person" language included by Congress in that provision.

Respondent, however, seizes upon the inclusion in the HUD Memorandum of the commonly-applied term "tester," which term has become judicial shorthand used to describe a person who is acting as a "private attorney general" and who is entitled to standing by virtue of the term "any person" as used in the Fair Housing Act. Although Respondent's exercise in semantics was presented to both the district court and to the Ninth Circuit, neither of the lower courts accepted the invitation to narrowly construe the term "any person" as used in 42 U.S.C. § 3604(f)(2).[4]

Plainly, there is no indication that Congress intended for Mark Mortenson's statutorily created right to accessible housing opportunities (provided by 42 U.S.C. § 3604(f)(2)) should be entitled to less vigorous enforcement than Sylvia

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[4] That the lower courts did not base their decision on narrowing the scope of the term "any person" is not surprising: in an opinion written by Judge William A. Fletcher (a member of the panel that heard the case at issue), the Ninth Circuit held that "The term 'any person' is quite broad . . . In its conventional usage, 'any' means 'ALL -- used to indicate a maximum or whole.' It certainly does not mean 'some.'" *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1080 (9th Cir. 1999) (citations omitted).

Colman's "statutorily created right to truthful housing information" provided by 42 U.S.C. § 3604(d). (*See, Havens* 455 U.S. at 374) In fact, the legislative history clearly indicates precisely the opposite:

> *Aggrieved person.* Provides a definition of aggrieved person to be used under this act. In Gladstone, *Gladstone Realtors v. Village of Bellwood*, the Supreme Court affirmed that standing requirements for judicial and administrative review are identical under title VIII. In *Havens Realty Corp. v. Coleman*, the Court held that 'testers' have standing under title VIII, because Section 804(d) prohibits the representation 'to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.' The bill adopts as its definition language similar to that contained in Section 810 of existing law, as modified to reaffirm the broad holdings of these cases.

H.R.Rep. 100-711, page 23, 100th Cong., 2nd Sess. (1988).

5. Regarding Recognition of Mortenson's Intangible Injuries.

Finally, Respondent argues that the case submitted for review does not present a conflict with decisions of other United States courts of appeals. Certainly, there is no conflict concerning the particular subsection (42 U.S.C. § 3604(f)(2)) that is central to the case presented for review. The conflict at issue, however, concerns the recognition of a plaintiff's *injury* related to a violation of the Fair Housing Act. Thus, although *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898 (2d Cir. 1993) concerned a violation of 42 U.S.C. § 3604(c), the critical point for the Petition is that the mere *observation* of discrimination (together with associated emotional distress

injury) was sufficient in that case to establish standing.

If anything, the fact that the *Ragin* case concerned a violation of 42 U.S.C. § 3604(c) demonstrates an even *stronger* case of a "split in the circuits" concerning recognition of injuries under the Fair Housing Act because 42 U.S.C. § 3604(c) does not contain the important "any person" language found in 42 U.S.C. §§ 3604(b), (d), and (f)(2).[5] Thus, the Second Circuit has permitted standing (and damages) to plaintiffs (who were similarly-situated to Mark Mortenson as far as the type of and extent of injury) under a provision of the Fair Housing Act containing language that is *weaker* than 42 U.S.C. § 3604(f)(2).

Respondent apparently seeks to distinguish more than the *nature* of Mark Mortenson's intangible injuries from those that were accorded standing by various United States courts of appeals. Iin its synopsis of cases and its limited description of 42 U.S.C. § 3604(c) (as dealing only "with *racially* discriminatory advertising." Brief in Opposition, p. 9., emphasis added), Respondent calls attention to the *protected class* of the plaintiffs in the cases, and thereby gives the impression that intangible injuries related to violations of the rights of the *disabled* are somehow entitled to a different legal

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[5] This distinction has been noted by the Tenth Circuit in *Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590, 596 (10th Cir. 1996):

> The provision here is 42 U.S.C. Section 3604(c), which prohibits discriminatory advertisements, but does not expressly state that advertisements and statements to 'any person' are unlawful; the subsection does not designate to whom the statements must be made to be unlawful. Subsection (c) therefore does not give all persons an express statutory right to be free from discriminatory advertising.

status (for the purposes of standing) as are intangible injuries related to racial discrimination or familial status discrimination. This difference is simply not found under the terms of the Fair Housing Act or any case law: the disabled are not to be held to a more stringent standard for alleging intangible injuries. *See,* H.R.Rep. 100-711, page 23, 100th Cong., 2nd Sess. (1988) (*supra*).

"Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *Riverside v. Rivera*, 477 U.S. 561, 574 (1986). Even if small in monetary amount, intangible injuries sustained by a civil rights plaintiff – by satisfying Article III's requisite "injury in fact" – provide a critical element in a functioning "private attorney general" enforcement provision.

CONCLUSION

The Ninth Circuit has recently considered, and sustained, the constitutionality of Ninth Circuit Rule 36-3, which Rule prohibits citation to unpublished opinions as precedent. *See Hart v. Massanari*, 2001 WL 1111647 (9th Cir., Sept. 24, 2001). Even so, "[n]onpublication must not be a convenient means to avoid review." *Smith v. United States*, 502 U.S. 1017, 1020 n. (1991) (Justice Blackmun, dissenting).

The questions presented in the Petition for Writ of Certiorari are either controlled by the *Havens* decision (regarding "tester" standing and the proper standard for dismissal under Federal Rule Of Civil Procedure 12(b)(6)) or are the subject of the HUD Memorandum (regarding the inclusion of design and construction violations within the scope of 42 U.S.C. § 3604(f)(2)). Surprisingly, *neither* of those authorities is addressed by the Ninth Circuit's decision. Accordingly, the propriety of a "GVR" order (as discussed at

pages 4-5 of the Brief of Respondent [Disabled Rights Action Committee] in Support of Petition for Writ of Certiorari) may be indicated.

Under a GVR order, the Ninth Circuit will have the opportunity to "flesh out" its opinion to explain *why* the Fair Housing Act should be interpreted in a manner contrary to HUD's understanding and to explain *why* a disabled man's intangible injury does not constitute an "injury specific to himself."

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